No. 10190.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

STERLING CARR, as Trustee in Bankruptcy of NIPPON YUSEN KABUSHIKI KAISYA, a Corporation, Bankrupt; and FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a Corporation,

Appellants,

vs.

HERMOSA AMUSEMENT CORPORATION, LTD., a Corporation, and J. M. ANDERSEN,

Appellees.

(And Thirteen Consolidated Appeals.)

APPELLEES' MOTION TO DISMISS CERTAIN APPEALS AND APPELLEES' REPLY BRIEF ON THE MERITS.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
ALLAN F. BULLARD,
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Proctors for Appellees.

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MOTION OF APPELLEES TO DISMISS CERTAIN APPEALS.

The appellees, Hermosa Amusement Corporation, Ltd. and J. M. Andersen, hereby move that the court dismiss each of the appeals herein, hereinafter designated, upon the following grounds:

1. That none of the libelants or intervening libelants named in the decree appealed from joined or are joined as appellants with the appellants herein in the said appeal, and no summons and severance or equivalent proceeding was had as to such non-joining party or parties.

2. That the libelants or intervening libelants named in the decree appealed from are necessary parties to the

appeal from said decree, and are not joined herein either as appellants or appellees.

The following are the appeals to each of which the motion is directed [See A. I., pp. 274-6]:

B. Appeal from decree in cause 1138-BH, in favor of Grace E. Mayo and Frank F. Mayo, Intervening Libelants, for $4100.00.

C. Appeal from decree in cause 1138-BH, in favor of George W. Berger, Libelant in Intervention, for $11,409.59.

D. Appeal from decree in cause 1138-BH, in favor of Norma Rubin, Lena Karsh, Florence, Lillian and Shirley Rose Karsh, etc., Libelants in Intervention, for sums aggregating $7330.42.

E. Appeal from decree in cause 1138-BH, in favor of Albertine K. Johnson, etc., Libelant in Intervention, for $4500.00.

F. Appeal from decree in cause 1138-BH, in favor of John Gilbert Montgomery, etc., Libelant in Intervention, for $625.00.

G. Appeal from decree in cause 1138-BH, in favor of S. T. Elliott, Libelant in Intervention, for $300.00.

H. Appeal from decree in cause 1146-Y, in favor of Roger S. Culp, etc., Libelant, for $4050.00.

I. Appeal from decree in cause 1147-BH, in favor of Wilma Greenwood, etc., Libelant, for $7500.00

J. Appeal from decree in cause 1148-Y, in favor of Helen McGrath, etc., Libelant, for sums aggregating $20,000.00.

K. Appeal from decree in cause 1149-RJ, in favor of L. R. Ohiser, Libelant, for $385.00.

L. Appeal from decree in cause 1154-B, in favor of J. Eldon Anderson, Libelant, for $300.00.

M. Appeal from decree in cause 1155-BH, in favor of Lucy Sylvester, etc., Libelant, for $5000.00.

N. Appeal from decree in cause 1296-BH, in favor of Wilfred Rasmussen, Libelant, for $1000.00.

Dated: December 23, 1942.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
ALLAN F. BULLARD,
Proctors for Appellees.

Notice of Motion.

To the Appellants herein and to their Proctors:

Please take notice that on Monday, January 11, 1943, at the hour of 10:00 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, at the courtroom of the United States Circuit Court of Appeals for the Ninth Circuit, in the Post Office Building, San Francisco, California, the appellees herein will move the court that it dismiss each of the appeals designated in the foregoing motion, upon the several grounds stated in said motion.

Dated: December 23, 1942.

ALFRED T. CLUFF,
HUGH B. ROTCHFORD,
GEORGE H. MOORE,
ALLAN F. BULLARD,
Proctors for Appellees.

APPELLEES' POINTS AND AUTHORITIES ON MOTION TO DISMISS CERTAIN APPEALS.

Statement.

On September 4, 1940, three miles to seaward of the Los Angeles Breakwater, the appellants' Motor Vessel SAKITO MARU ran down and sank the appellees' vessel OLYMPIC II, at anchor. Eight lives were lost, several persons were injured and considerable property of third persons on OLYMPIC was lost.

Following this disaster a suit was filed in the District Court for the Southern District of California by the appellee, Hermosa Amusement Corporation, Ltd., as owner of OLYMPIC against SAKITO and her owner, the appellant, Nippon Yusen Kabushiki Kaisya, for the loss of OLYMPIC and her equipment. This was cause No. 1138-BH and is identified by the symbol A in the stipulation hereinafter referred to. Thereafter the representatives of persons who lost their lives, persons who were injured and persons who lost property as a result of the collision filed libels in intervention in cause No. 1138-BH or filed independent libels. Some of these named as respondents only SAKITO and the appellant, Nippon Yusen Kabushiki Kaisya, but others also named the appellees as owner and master of OLYMPIC as respondents.

In all of these last mentioned libels and proceedings the appellant appeared and answered as respondent or claimant, or both, and thereafter filed third party petitions under the 50th Admiralty Rule, alleging that the collision was due solely to the faults of OLYMPIC and of the appellees, who were named as third party respondents. The appellees, as such third party respondents, answered

the petitions and the libels and intervening libels. All causes being at issue they were consolidated for trial, and a trial was held as to the issues of liability as between the two vessels. The trial court thereupon rendered an opinion holding that the collision was due solely to the fault of SAKITO, exonerating OLYMPIC and appellees, and directing that libelants recover their damages from her and her owner. The trial was continued for proof of the claims of the libelants and intervening libelants.

The amount of damage in the principal suit, in which the appellee, Hermosa Amusement Corporation, Ltd., was libelant, was fixed in reference as were two other property loss claims. The death and personal injury claims were heard by the court. In many of these the damages were fixed by agreement between the claimants and the appellant. After all damages had been liquidated the court made its separate decree upon each claim.

There were fourteen separate decrees, including the decree in the principal cause. The appellant, Nippon Yusen Kabushiki Kaisya, and its surety appealed from each decree, but in all cases but the principal case (wherein only the appellee, Hermosa Amusement Corporation, Ltd., was a libelant), the appellants failed to join as appellant or appellee the successful libelant or intervening libelant, and named as appellees only Hermosa Amusement Corporation, Ltd. and Captain Andersen, who were the respondents named in their third party petition. There was no summons and severance or the equivalent as to any of these libelants.

Our motion is directed to the separate appeal in each of the thirteen causes, in or in respect to which third party petitions were filed by the appellant, and wherein the ap-

peal does not join as appellant or appellee the successful libelant or intervening libelant therein. The decree appealed from in each case dismissed the libel or intervening libel and the third party petition as to both appellees, and awarded the latter their costs against the libelant *and* the third party petitioner.

The causes are those described in the stipulation at A. I, pp. 273 *et seq.,* and marked by the letter symbols B to N inclusive [*id.* 274-5]. Cause A is the principal cause in which no third parties were involved as libelants, and that cause is not attackable by the motion.

In order to prevent duplication in the printed record it was stipulated [A. III, pp. 1415; 1422; 1424-5] that the pleadings and decree in cause B are typical in substance with the proceedings in all causes based on libels in intervention (B, C, D, E, F and G) and the proceedings in cause J are typical in substance with the proceedings in all causes based upon independent libels (H, I, J, K, L, M and N). The papers on appeal in cause C are typical of the appeal papers in all the other causes involved in this motion.

It will readily be observed that the issues tendered against the appellees by the libel and third party petition in each case are identical in substance in all cases, to-wit, the fault for the collision. The decrees resolved these issues in favor of the appellees and against the libelants and appellant as third party petitioner, and awarded joint judgments for costs. Each decree refers to the opinion of the court and adopts the findings therein set forth. [See Decree in Cause B, A. I, pp. 181; 183-4; Cause J, *id.* pp. 239; 243.]

It also will be observed from the typical appeal papers in cause C that the petitioners for appeal [A. I, pp. 261-2] are Nippon Yusen Kabushiki Kaisya, its surety, and Mr. Carr as receiver in bankruptcy for Nippon Yusen Kabushiki Kaisya; that the appeal is from the *final decree* and not from a part thereof, and that the errors urged in the assignments of error cover the entire question of liability for the collision. [*Id.* pp. 263-8.] The typical citation on appeal [*id.* p. 3] is directed to Hermosa and Captain Andersen, as appellees. There is no showing of any summons and severance or the equivalent.

POINTS AND AUTHORITIES.

I.

The decree in each cause (B to N inclusive) is, in so far as it determines the liability of these appellees in respect to the subject matter of the libel and third party petition, joint in form and joint in substance. It dismisses the pleadings by which each party asserted that single liability against appellees and awards a joint judgment for the appellees' costs against the libelants and the appellants.

II.

It is elementary that where a party desires to appeal from a joint judgment or decree, he must procure the joinder *as appellants* of all parties against whom the decree or judgment runs, or proceed alone only after proper

summons and severance or its equivalent. Failing both, the appeal must be dismissed.

Masterson v. Herndon, 10 Wall. 416;

Hardee v. Wilson, 146 U. S. 179;

Davis v. Mercantile Trust Co., 152 U. S. 590;

Hartford Accident Co. v. Bunn, 285 U. S. 169;

Mitty Bros. Construction Co. v. United States (C. C. A. 9), 75 Fed. (2d) 79;

Pflueger v. Sherman (C. C. A. 9), 75 Fed. (2d) 84;

Hudson v. Pacific Trust Co. (C. C. A. 9), 93 Fed. (2d) 821.

III.

The new Rules of Civil Procedure, which permit an appeal by any party without summons and severance, do not apply in an admiralty cause.

Rule 1;

Rule 81, Subd. 1.

IV.

Assuming the court is disposed to look beyond the faces of the decrees, it will be readily ascertained on the face of the record that as to the liability of the appellees there were no severable issues as between the appellants and the libelants in any cause. Each asserted against the appellees the same charge—fault for the collision. Cases of independent claims for several liability, such as *The Columbia* (C. C. A. 9), 73 Fed. 226, are not in point.

V.

This is not the usual technical motion made in admiralty causes, where an appellant has inadvertently failed to join his stipulator for value. Nor are the judgments here joint only as to execution, as in *Eliot v. Lombard,* 292 U. S. 139. The appellant and the libelants both litigated these causes against the appellees upon the same issues and the adjudications of the decres run against both.

VI.

The appeals are from the whole of each decree. If the recitals of the petition [A. I, p. 262] indicate an attempt to bring the appeal within Rule 4 of the Rules in Admiralty of this court relating to review in part only, they failed of their purpose. That rule requires that the appellant *state in his petition* for appeal that he desires *only* to review one or more questions. No such statement can be found in these petitions. The appellants state that "they may have reviewed" the questions whether OLYMPIC II was not in fault and whether SAKITO MARU was not free from fault. Obviously such a review would be a review of the whole case as far as liability is concerned. Furthermore, the petitions do not state that the appeal is limited to the specified questions, and therefore must be taken as an appeal from the whole of the decree.

Even if the appeal be held limited to the specific questions stated, a review of the conduct of the OLYMPIC in any respect would involve the interests of each libelant. They are just as indispensable as parties to such a review as to a review of the whole judgment.

VII.

If for any reason the libelants and intervening libelants are not required to be made parties appellant to these appeals or to be summoned and severed, it is unmistakable that they are indispensable parties to the appeal in *some* capacity. It is elementary that all parties affected by a judgment must be made parties appellant *or* appellees. These libelants are not joined in any capacity. The appeals should, therefore, be dismissed for lack of necessary parties.

Davis v. Mercantile Trust Co., 152 U. S. 590;

Wilson v. Kiesel, 164 U. S. 248;

Babcock v. Norton (C. C. A. 2), 5 Fed. (2d) 153;

Interstate Oil Co. v. Gormley (C. C. A. 9), 105 Fed. (2d) 431.

Respectfully submitted,

Alfred T. Cluff,
Hugh B. Rotchford,
George H. Moore,
Allan F. Bullard,
Proctors for Appellees.

No. 10190.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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Appellees.

(And Thirteen Consolidated Cases.)

APPELLEES' REPLY BRIEF ON THE MERITS.

Statement of Facts.

The OLYMPIC II, at anchor on the open sea, something more than three miles to seaward of the Los Angeles Breakwater entrance, was run down and sunk at her anchors by the Japanese Motorship SAKITO MARU. The trial court found: (1) the OLYMPIC II was anchored on a long established and well known fishing ground or bank, frequented constantly by fishing craft of all descriptions. including fishing floats or hulls of the type and occupation of the OLYMPIC II; that she was not anchored in or in the vicinity of any channel or fairway, but was surrounded by miles of navigable water [A. I, pp. 113-5];

(2) that the collision occurred in daylight, but in a light fog which, at the time of the collision, was beginning to lift, with the bright sun breaking through; that the visibility was *at least* 1800 feet [*id.* pp. 116-20]; (3) that by "overwhelming evidence" it was established that the OLYMPIC II was sounding proper fog signals [*id.* p. 127]; that the SAKITO MARU, by the evidence of her own records, was proceeding at a speed of not less than 8 miles per hour when she sighted the OLYMPIC II about 200 meters ahead; that even at a speed of 6½ miles per hour she would require 300 meters to come to a stop [*id.* pp. 120-24]; and (4) that, assuming upon conflicting evidence that the SAKITO MARU had a lookout properly posted, he was a lookout in name only; he failed to see the OLYMPIC II until long after she was within his range of vision, and that if he had been an efficient lookout the collision could easily have been avoided. [*Id.* p. 124.]

Naturally the court's judgment was that the collision was due solely to the faults of the SAKITO MARU.

All the essential facts necessary to an understanding of how the collision happened are given in the above summary of the principal findings, and we do not think a long statement by us will be of any assistance to the court. The statement of the appellants (Br. pp. 3-10) gives the character and dimensions of the vessels and the course of the SAKITO, and if we disregard a few over-demonstrative adjectives and adverbs, and make due allowance for theatrical expressions, the statement is sufficient for general purposes. We shall defer detailed statements on particular points to the specific discussions thereof.

It should be noted that the statements as to the SAKITO's speeds after 7:03 A. M. (Br. pp. 5-6) are dis-

puted and were not accepted by the court. There was convincing evidence from her own testimony and records that her speed between 7:03 A. M. and the collision was as high as 10 to 14 miles per hour.

The actual distances between the three anchored barges is important on several aspects of the case, particularly as affording measures of visibility.

The positions of the three barges and the distances between them were definitely fixed by Boatswain Reeder of the Coast Guard, by observations taken on two occasions at the beginning of the fishing season. The positions of the three vessels were the same on the morning of the collision, except that on that morning the POINT LOMA was heaving up her anchors, preparatory to going in for the winter, and had pulled short on her bow anchor until her hull and the OLYMPIC's were practically abreast. This, of course, did not alter the lateral distance that separated them.

Mr. Reeder's observations, which were accepted by the trial court and embodied in the findings [A. I, p. 114], established the positions of the three barges as follows:

SAMAR (RAINBOW)—144° true, 3 miles from the lighthouse on the Los Angeles Breakwater.

POINT LOMA—159° true, 3 miles from the lighthouse.

OLYMPIC II—160° true, 3.2 miles from the lighthouse.

The OLYMPIC and POINT LOMA were therefore practically abreast .2 of a mile apart, and the SAMAR was about 2/3 of a mile astern of the POINT LOMA. The actual distances between the three vessels was: OLYMPIC to SAMAR 1800 yards; POINT LOMA to SAMAR 1600 yards; OLYMPIC to POINT LOMA 400 yards. [A. III, pp. 1369-

72.] The accurate distance between the OLYMPIC and POINT LOMA is particularly important as that was the standard by which the accuracy of many of the estimates of visibility was measured. The writer of the SAKITO's brief has overlooked or ignored the distances established by Mr. Reeder and found by the court, and has used some computations of Lt. Hewins of the Coast Guard, which were made from over the wreck of the OLYMPIC after she had sunk. [A. III, p. 969.] He fixed, from his recollection, the distance between the OLYMPIC and POINT LOMA before the collision at 1/8 of a mile, 260 yards. [*Id.* pp. 985; 987.] When counsel use Lt. Hewins' estimate, as reflecting the true distance between the two barges prior to the collision, they overlook the fact that the collision tore the OLYMPIC from her stern anchor and drove her broadside through the water and toward the POINT LOMA a very considerable distance. Captain Collins, SAKITO's witness, said that the impact of the collision so far toward the POINT LOMA cut the distance about half. [A. III, p. 1076.] Many other witnesses observed this movement. It follows, therefore, that Lt. Hewins' observations, taken on top of the sunken wreck after the collision, do not reflect the true distance between the two barges before the collision, and his recollection as to where the OLYMPIC had lain was evidently inaccurate.

We must also add some details of the actual collision and its effect on the OLYMPIC:

When those on the SAKITO tardily woke up to the presence of the OLYMPIC, the SAKITO's rudder was put hard right, and when she struck the OLYMPIC she was swinging to the right. This turn caused her to hit the OLYMPIC's port side and cut the OLYMPIC in two—side,

decks, bottom and keel, so that her bow overhung the OLYMPIC's *starboard* side. Measurements taken of the scars on the SAKITO's bows show that she made a breach in the OLYMPIC's side at least 12 feet wide and with over 23 feet of penetration into her hull, tearing through decks, bottom and keel. [A. III, pp. 1377-85.] The shock of the impact was enough to stop the swing of the SAKITO's stern to port and cause it to swing 30° to starboard. [See Course Recorder tape at approximately 7:10 A. M., A. II, p. 856.] In this swing the SAKITO was a gigantic crowbar with a 23-foot "bite" into the OLYMPIC's side. Following the collision the SAKITO backed or drifted out of the hole in the OLYMPIC's side, and the OLYMPIC sank within three or four minutes.

One of the OLYMPIC's shoreboats, the LILLIAN L, had just brought a few patrons to the OLYMPIC and was lying at her starboard gangway, with engines running. When the LILLIAN L's skipper saw the SAKITO approaching he shouted to the patrons and dashed back to his boat. A number of patrons got on board the LILLIAN L. Her skipper held the LILLIAN L alongside until the impact and, although the little craft was nearly swamped as the OLYMPIC was driven sideways through the water, she managed to pull clear with her passengers. [A. II, pp. 719-23.] Meanwhile another water taxi, the H-10 No. 17, had been drifting near the POINT LOMA, which was about 400 yards inshore of the OLYMPIC. Her skipper was warned of the approach of the SAKITO, had started his taxi over to the OLYMPIC, and had come up to her bow when the impact occurred. When the LILLIAN L had fought herself clear of the OLYMPIC and the latter's sideways movement ceased, the H-10 No. 17 went alongside the OLYMPIC's gangway, in the place vacated by the

LILLIAN L, and took off many patrons. She was still alongside when the OLYMPIC went down. [A. II, pp. 611-24.]

The OLYMPIC was equipped with a lifeboat and an approved launching device, but with the two powered taxis alongside and other powered boats in the vicinity speeding up to the OLYMPIC's position, the OLYMPIC's crew wisely made no attempt to launch the lifeboat, but devoted their efforts to serving out life preservers and directing and assisting the patrons onto the taxis. Every person on the OLYMPIC apparently received a life preserver. Greenwood, the barge master, and Culp, the bait boy, went down with their ship, never relaxing their efforts to save the patrons. Ohiser, the watchman, was saved only because he jumped to the roof of the H-10 No. 17, better to assist the patrons, and when the OLYMPIC sank he was half into the water with a young girl in his arms. [A. II, pp. 623-4; 673.]

Nature of the Evidence.

In the immediate vicinity of the OLYMPIC's place of anchorage were five other vessels, at anchor or drifting on the fishing grounds. They were the POINT LOMA, a wooden fishing barge, similar to the OLYMPIC, anchored about 400 yards inshore of her; the tug RAY R. CLARK, which was lying near the POINT LOMA, with her master aboard the latter vessel; the water taxi H-10 No. 17, which took off the last of the OLYMPIC's survivors, and the PAT and the MAR-ELL, two small fishing boats which were anchored just astern of the OLYMPIC. None of these vessels was involved in the collision except as rescue vessels, and the testimony of their people gave the court a backlog of neutral evidence, which is very rare in colli-

sion cases. All of these neutral eye-witnesses testified in open court, five being called by the OLYMPIC and two by the SAKITO. The survivors from the OLYMPIC testified in court, as did the master of the SAKITO. Yokota, the SAKITO's first officer, and Shimada, her lookout, testified by deposition. Kato, the chief engineer, testified by deposition, but he was not an eye-witness and his testimony consisted principally of engine-room detail and records, which was not controverted. A few minor witnesses from the SAKITO's deck watch were unavailable at the trial, owing to the suspension of sailings between Japan and the United States. A motion for continuance was made by the SAKITO's counsel on account of the absence of these witnesses, but was denied by the court upon an offer by counsel for OLYMPIC and counsel for other libelants to stipulate that such witnesses, if sworn, would testify in accordance with certain written statements produced by the SAKITO's counsel. The stipulation was accepted and the written statements were received and considered in evidence. [A. III, pp. 1287-94.] These statements are either negative or cumulative.

All the crucial witnesses on both sides testified in open court with the exception of the SAKITO's first officer and lookout. Their testimony, given by deposition in advance of the trial, was in the main consistent with the story of the SAKITO's master.

Applying the rule of *The Ernest H. Meyer* (C. C. A. 9), 84 Fed. (2d) 496-501, it would seem that upon disputed factual issues the presumption in favor of the trial

court's findings has great weight; possibly not the greatest weight which would be given when all witnesses testified in court, but certainly far more than the minimum weight which is given when all the evidence, or all of one side's evidence, is given by deposition. We take it that the weight of the presumption is always a variable, depending upon the circumstances and the particular issues to which the presumption is to be applied.

We understand the rule of this court to be that when this court has weighed the whole evidence, with the presumption in favor of the correctness of the trial court's findings, it will not disturb the decision of the trial court on controverted questions of fact, unless they are clearly against the *weight* of the evidence.

The Ernest H. Meyer (*supra,* p. 500).

Another rule of this court which must serve as a guide in factual examination is that the court cannot re-determine the credibility of witnesses heard below, and will presume that the trial court, hearing the witnesses, rejected testimony of factors not comporting with its findings.

Crowley Launch & Tugboat Co. v. Wilmington Transportation Co. (C. C. A. 9), 117 Fed. (2d) 651; 653.

ARGUMENT.

I.

The Case Against the SAKITO MARU.

Although it will reverse the order of presentation selected by the appellants, we shall examine first the attack on the trial court's findings of fault against the SAKITO, the moving vessel. (Br. pp. 57-69.)

In considering the SAKITO's conduct we must ever bear in mind the presumption of fault which is to be applied when a vessel in motion runs down a vessel at anchor.

The Granite State, 3 Wall. 310; 18 L. Ed. 179, 180;

The Virginia Ehrman, 7 Otto 309; 24 L. Ed. 890, 892;

The Oregon, 158 U. S. 186; 15 S. Ct. 804;

The Southern Cross (C. C. A. 2), 93 Fed. (2d) 297;

The Providence (C. C. A. 2), 67 Fed. (2d) 865; *The City of Norfolk* (C. C. A. 4), 248 Fed. 780;

United States v. King Coal Co. (C. C. A. 9), 5 Fed. (2d) 780.

In the last case the court said:

"The barge Ruth was at anchor with her anchor lights burning. Her anchorage was not in a forbidden area. Her visibility to moving shipping was normal, and her position was discovered in time for safe navigation on the part of the submarine. The presumption is, in such a situation, that the barge at anchor, properly lighted, was not at fault, while, on

the other hand, the presumption is that the moving submarine, charged with reasonable caution, was at fault, and the evidence supports this presumption." (p. 783.)

The trial court has found that the OLYMPIC was anchored in a proper place, and was sounding proper fog signals. We shall see that these findings are sustained by the great weight of evidence. The presumption of fault is, therefore, heavy upon the SAKITO, but it is so clear from the evidence that she was guilty or demonstrable fault that the presumption is hardly needed.

The trial court found the SAKITO in fault in two major respects: excessive speed in fog, and insufficient lookout. These faults are established by the overwhelming weight of the evidence; indeed SAKITO's own testimony admits that she was going at such a speed that she could not come to a stop within the whole distance which her witnesses claim they could see ahead. The court found also that the actual visibility was three times the distance claimed by the SAKITO, and that there would have been ample time for the SAKITO to have seen and avoided the OLYMPIC if the SAKITO had been keeping a proper lookout.

As a preliminary to an accurate appraisal of the SAKITO's conduct we should have the background of the actual visibility at the time of collision, and of the nature and audibility of the fog signals being sounded by the OLYMPIC and other vessels in the vicinity:

A. Visibility.

As was pointed out in the factual statement, the distances between the three fishing barges had been found on the basis of observations taken before the collision by Boatswain Reeder of the Coast Guard Cutter Cahoone, and these measurements give us a good yardstick with which to test the evidence and estimates of visibility of the various witnesses.

The Olympic and Point Loma were nearly abreast, as observed by Mr. Reeder, and were actually abreast on the morning of the collision, as the Point Loma had hove short on her bow anchors. [A. III, p. 1062.] Practically all the witnesses testified that the Point Loma and the Olympic were just about abreast, as is delineated in the Olympic's Exhibit 4. [A. I, p. 359.] The lateral distance between the Olympic and the Point Loma was 400 yards (1200 feet), and the Samar was 1600 yards astern of the Point Loma (probably nearer 1800 yards after the Point Loma had pulled up on her bow anchor) and 1800 yards on the starboard quarter of the Olympic.

The Ray R. Clark, a tug, was drifting alongside the Point Loma's port bow, and the water taxi H-10 No. 17 was drifting and fishing just beyond the Ray R. Clark.

A little fishing boat, the Mar-Ell, was anchored about 200 yards directly astern of the Olympic, and another little fishing boat, the Pat, was anchored very near to the Mar-Ell.

We can, therefore, present the testimony as to visibility at the time of collision from three viewpoints (1) from the Olympic herself, (2) from the two little fishing boats astern of her, and (3) from the Point Loma and the

small vessels alongside of her, whose people saw the SAKITA approach over the deck of the OLYMPIC.

The witnesses on the OLYMPIC:

Elwood Johnson, a patron who lost his son in the disaster, was fishing on the OLYMPIC's port rail. He was reeling out his line and saw the SAKITO coming out of the fog. It seemed over half a mile, probably three-quarters of a mile, away. She was headed so that it seemed she would pass ahead of the OLYMPIC and he had no apprehension of collision. He continued fishing and reeled out 200 yards of line. The SAKITO came closer and he began to fear she might run over his line, so reeled in. He could see the ship clearly and distinctly several lengths away. He thought she would clear ahead of the OLYMPIC, but she turned to her right, toward the OLYMPIC. He reeled in the rest of his line rapidly and had secured his pole when the SAKITO struck the OLYMPIC. The fog was high and the sun was beginning to break through. [A. II, pp. 552-62.]

Ohiser, the OLYMPIC's watchman, was at the bell on the main deck. Apparently he and Johnson saw the SAKITO at about the same time. He was ringing regular fog peals on the bell, and when the SAKITO came out of the fog and became clear she was five or six of her own lengths away. He had no apprehension of collision and continued to ring the regular peals. Then the SAKITO turned to her right and headed toward the OLYMPIC, whereupon he rang the bell loudly and continuously until the collision. [A. II, pp. 661-9.]

Lillian Karsh, the concessionaire's older daughter, saw the SAKITO through the kitchen window. (The kitchen was

in the OLYMPIC's after deckhouse.) She seemed quite a distance away, was headed to the westward of the OLYMPIC, and the girl did not pay much attention to it. Then someone, she thought Captain Stiles of the LILLIAN L, called her attention to it. It was getting "awfully close." Then it turned toward the OLYMPIC and the bell started ringing very fast. [A. II, pp. 583-5.]

Stanford Stiles, Captain of the LILLIAN L, had just come aboard the OLYMPIC in search of breakfast. Another daughter of the concessionaire directed his attention to the SAKITO and he went to the end of the alleyway, where he could see out. By that time the SAKITO was only 100 to 150 yards away and had evidently made her turn, as he could only see the bow, not the whole side. [A. II, pp. 715-17.]

It is fully evident that Johnson, Ohiser and Miss Karsh saw the SAKITO long before she made her turn to starboard. That turn marks the time when the SAKITO's people woke up to the presence of the OLYMPIC and saw her 200 meters ahead. It is clear from the OLYMPIC's testimony that the SAKITO was actually in sight so long before the turn that Johnson had time partly to run out and wholly to reel in his line; Ohiser to ring several regular peals on the bell, and Miss Karsh to lose interest in the approaching vessel and devote herself to other activities. It seems clearly to bear out the estimates of Johnson and Ohiser that when first sighted, the SAKITO was at least a half mile or six lengths away.

The witnesses on the fishing boats astern of the OLYMPIC:

Grothe and Walters were professional fishermen on the boat MAR-ELL. Grothe had had sea experience on deep water vessels. They could see and hear all three barges plainly, and it should be remembered that the SAMAR was actually more than half a mile away. They heard the SAKITO's fog whistle and saw her take shape as a black mass, easily half a mile away. She came clearly into sight and it seemed she would clear ahead of the OLYMPIC, but when two or three hundred yards from the OLYMPIC she turned to her starboard. [Grothe A. I, pp. 418-28; Walters A. II, pp. 648-52.] Walters estimated the visibility as about half again the distance from the MAR-ELL to the SAMAR. (Actually about 2400 yards.) [*Id.* pp. 648.9.]

Jones and Harris were pleasure fishermen on the PAT, which came to anchor about 15 minutes before the collision. As they came out to the place of anchorage the fog was quite thick, with visibility of about 300 yards, but it lightened rapidly. They did not see the SAKITO until she was about three of her own lengths away, but would have seen her earlier if they had looked. Jones estimated the *visibility* at the time he saw the SAKITO at about 2 miles. [Jones, A. II, pp. 480, 499-501; Harris, *id.* pp. 505-11.]

The witnesses on or near the POINT LOMA:

Captain Collins and Liddell were the SAKITO's witnesses. Smith, master of the H-10 No. 17, was called by the OLYMPIC.

Captain Collins of the RAY R. CLARK was on the POINT LOMA; Liddell was at the controls of the RAY R. CLARK, drifting nearby; and Smith was on his taxi, drifting near the RAY R. CLARK. All these witnesses were approximately 400 yards inshore of the OLYMPIC, and she was between them and the approaching SAKITO. They could only see the SAKITO over the OLYMPIC's deck.

Collins *accurately* estimated the distance between the POINT LOMA and the OLYMPIC as between 1000 and 1200 feet. When the SAKITO first came into his vision she was approximately the same distance the other side of the OLYMPIC. He is inclined to underestimate distances rather than overestimate them. He saw the SAKITO hit the OLYMPIC and push her almost half the distance to the POINT LOMA. He could see people on the OLYMPIC putting on life belts. He could hear all the barges ringing their bells in rotation. [A. III, pp. 1063-76.]

Liddell, Captain Collins' deck hand, was at the controls of the RAY R. CLARK. He heard the SAKITO's whistle and was trying to get a bearing on her with his compass. When he saw the SAKITO she was only 25 feet from the OLYMPIC's side and he called to Smith in the H-10 No. 17. He heard the OLYMPIC sounding proper fog signals. [A. II, pp. 767-8, 772-3.]

There was something very wrong as to Liddell's 25-foot figure, for, as we shall see, Smith in the H-10 No. 17 had time to start his taxi from inertia and cover nearly 400 yards to the OLYMPIC before the impact occurred.

Smith had his attention called to the SAKITO by Liddell. He looked and saw the SAKITO over the OLYMPIC's deck, about 600 yards on the other side of the OLYMPIC. His engine was running and he started the taxi toward the

OLYMPIC, soon attaining its maximum speed of 13 miles. He had covered the distance to the OLYMPIC's bow when the collision occurred, and the pushing of the OLYMPIC through the water made him overrun her, and he had to circle back to come around the bow and alongside the starboard gangway. Smith overestimated the actual distance between the POINT LOMA and the OLYMPIC by 100 to 200 yards. [A. II, pp. 611-18.]

SAKITO's counsel discuss the question of visibility at great length (Br. pp. 12-19). Their argument is, in short, nobody should be believed but the Japanese witnesses and Liddell. They shorten the actual distance between the POINT LOMA and the OLYMPIC to one-eighth of a mile by using Lt. Hewins' estimate, based on his recollection and on measurements taken over the *wreck* of the OLYMPIC; attempt to discredit the estimates of Collins, their own witness, and disregard his testimony (amply corroborated) that the SAKITO pushed the OLYMPIC broadside nearly half of the distance to the POINT LOMA. They add Liddell's 25 feet to an eighth of a mile and assume that was the limit of visibility. Then they claim that Liddell's testimony corroborates the SAKITO's estimates of a 200 meter visibility. All other testimony they characterize as inherently improbable and, with that characterization, sweep it away.

The trial court found on all the evidence that the visibility from the bow of the SAKITO was at least 1800 feet. We think that after the foregoing summation we need not argue that this finding is supported by the overwhelming weight of the evidence.

The court commented in its opinion as to the unsatisfactory testimony from the witnesses on the Japanese

vessel. There was great justification for this comment. First Officer Yokota testified by deposition that until he saw the OLYMPIC 200 meters ahead he thought the visibility was about 600 meters (1950 feet). But because neither he, the lookout nor Captain Sato saw the OLYMPIC until she was only 200 meters away, he infers it must have been due to his own overestimate of visibility and not to a very bad lookout. Captain Sato, who testified at the trial, thought the visibility was 300 meters, but he too claims to have made an overestimate. The lookout had no idea whether the OLYMPIC was 500 or 5000 feet away when he sighted her. Counsel hint that if the court had granted their motion for a continuance, the SAKITO's other witnesses might have developed something about the visibility. But the unchallenged statements of these witnesses, prepared by counsel's investigator, were received in evidence, and counsel do their investigator little justice when they infer that anything legitimately beneficial to the SAKITO's case was left out of those statements.

But estimates aside, the thing which to our minds fully warrants the rejection of the SAKITO's testimony of a visibility of 200 meters is their plain admission that the Japanese vessel's course was turned to starboard as soon as the OLYMPIC was discovered. They had not seen the OLYMPIC at all until a few seconds before that turn. Half a dozen witnesses from several different viewpoints saw the SAKITO approaching minutes before that turn was made;—Johnson, fishing on the OLYMPIC's deck; Ohiser at the bell; Miss Karsh in the galley, and the fishermen on the boats astern of the OLYMPIC, all saw her before

she turned and saw her make the turn. The trial court was impressed with this aspect, as well as by other circumstances mentioned in the opinion, which are self-evident without further exposition on our part.

B. Olympic II's Bell Signals and Their Audibility.

The court made no specific finding on the distance the sound signals from the barges could be heard, but took it for granted that they would have been heard by a diligent lookout long before they were heard on the Sakito. The court found that the evidence was "overwhelming" that the Olympic was sounding proper fog signals.

The Olympic had a big ship's bell, 14 inches in diameter. (The Supervising Inspectors' Rules call for a minimum of 8 inches on *any* vessel.) Its audibility had been previously demonstrated at a distance of a mile. [A. II, pp. 773-4.] On the morning of the collision it was heard by almost everyone within a radius of a mile, except the officers and lookout of the Sakito.

All of the barges could hear each other's bells, and it was their practice to ring in rotation so as not to mask each other's rings, and to add a final stroke or two to identify the particular barge. The Olympic and the Samar could hear each other's bells, although they were 1800 yards apart.

Practically every witness who testified and was not operating a boat with a running engine, testified that the Olympic was sounding proper fog signals. Collins and Liddell, the Sakito's witnesses, so testified; Grothe and Walters on the Mar-Ell, and Jones and Harris on the Pat so testified; Miss Karsh, Stiles and Ohiser, the bell

ringer on the OLYMPIC, so testified. These people testified that the barges were ringing in rotation, that the OLYMPIC's peals were substantially 5 seconds long and were rung every 45 seconds to a minute, and during all material times the ringing of these peals was continuous, right up to the time the SAKITO turned to starboard. Thereafter, and up to the moment of collision, the OLYMPIC's bell rang a continuous roll. Here are some of the record references on the OLYMPIC's bell ringing: Kroth, A. I, pp. 420-23, 433-4; Jones, A. II, pp. 480-2, 487; Harris, *id.* pp. 507-8, 514; Johnson, *id.* pp. 553, 561; Karsh, *id.* pp. 582-3, 585; Smith, *id.* pp. 618-19; Walters. *id.* pp. 649, 651; Ohiser, *id.* pp. 661-3, 667, 668, 679-90, 704-5; Stiles, *id.* pp. 709-10, 713-4; Liddell, *id.* pp. 765, 768, 772-3; Collins, A. III, p. 1063.

The SAKITO's counsel even developed by hearsay that an unknown fishing boat, fishing about one-half mile southeast of the OLYMPIC and out of sight of her, had reported to the Coast Guard that they saw the SAKITO pass them, inbound, and they could hear the OLYMPIC's fog bells faintly. [A. III, pp. 1054-5.]

Counsel for the SAKITO discuss the evidence as to the ringing of the OLYMPIC's bell at pages 19-22 of their brief. As in the matter of visibility, they claim that all fact testimony opposed to them is vague, general and incredible. Apparently it is counsel's position that it is not enough that five or six witnesses testified that regular peals were rung every minute or thereabouts, and there was no cestation until just before the collision, when the peals changed to a continuous ringing (Br. p. 20), but every witness must testify as to each peal and give its exact time, or all his testimony must be rejected.

Counsel also urge that Ohiser stated that some time between 6:30 and 7:10 he stopped ringing the bell for a few minutes when the fog seemed to lift, and argue that this must have been during the critical time between 7:00 and 7:10 (Br. pp. 20-21). It is hardly necessary to say that any such assumption is, as the trial court put it, against the "overwhelming" evidence. It is reasonable to suppose that if there had been any cessation in the OLYMPIC's bell ringing, after all these experienced seamen had heard the SAKITO's whistles and were watching for her approach, at least one of whom would have noted the silence of the OLYMPIC? There must have been twenty or twenty-five qualified observers on the neighboring vessels, all of whom were interviewed by both counsel, yet SAKITO's counsel did not produce a single witness to testify that there was any cessation in the OLYMPIC's bell ringing, or that it was not proper in any other respect. We could have augmented the testimony on the bell ringing by threefold, but the trial court was manifestly impatient of cumulative evidence once he felt that a point was sufficiently established, and there were several witnesses under subpoena and in actual attendance whom we did not call.

It was small triumph for SAKITO's counsel to have confused Ohiser on cross-examination. The man had been subjected to five long inquisitions on this collision, and he was the sort of witness, often encountered, who cannot tell a story lucidly under formal examination. His time estimates were utterly impossible and he is so susceptible to suggestion that counsel can almost make him doubtful of his own existence. The trial court was fully conscious of Ohiser's instability as a witness, and stated that be-

cause of it he had disregarded his testimony entirely, except where it was amply corroborated. [A. I, p. 126.]

Whether Ohiser's evidence be entirely disregarded or considered with all its implications, we confidently submit that the audibility of the OLYMPIC's fog bell and the fact that it was properly rung during all significant times was established by the overwhelming weight of evidence, and the trial court's findings to that effect could not properly be disturbed.

Now, with the background of a visibility of at least 1800 feet, as found by the trial court, and the sound signals, proper for an anchored vessel, being sounded by OLYMPIC, we proceed to an examination of the evidence as to the faults of the SAKITO, which this court must weigh *with* the presumption of fault arising when a moving vessel runs down one at anchor.

C. THE SAKITO MARU'S SPEED.

Chief Officer Yokota claimed that when she sighted the OLYMPIC at 7:09 A. M., 200 meters away, the SAKITO's speed was 6 to 6½ miles per hour at 50 revolutions per minute of her engines. [A. II, p. 838.] Captain Sato said it was 6¼ to 6½ miles. [A. III, p. 1007.] She had cut down to "slow"—50 revolutions per minute, at 7:03 A. M. and it took three minutes for the speed to decelerate from 16 miles per hour to her normal 6-6½ mile speed at "slow ahead." She had therefore reduced to the latter speed at 7:06 and continued it until 7:09, when the OLYMPIC was sighted.

At that speed, loaded as she was, the officers believed she could be brought to a stop by a "full astern" on both engines in one and one-half or two lengths of the ship

[Sato, A. III, p. 1140]; in 300 meters. [Yokota, A. II, p. 909.] The ship's length, over all, is 154½ meters [*id.* 803].

If, as the SAKITO's witnesses insist, they were unable to see the OLYMPIC on account of impaired visibility until she was only 200 meters away, they convict SAKITO forthwith of excessive speed, for she was manifestly unable to stop within the *whole* distance her people could see ahead.

It is true, as counsel say, that the International Rule (Article 16) provides that a vessel in fog shall "go at a moderate speed," and moderate speed is not defined. The courts have fixed a test, however, which fits all conditions and all situations. It is the so-called "rule of sight," requiring that the speed in impaired visibility shall be such that the vessel can be stopped or avoid collision within half the distance she can see ahead.

We hardly need discuss the rule of sight, for this court has applied it in many recent cases.

The Ernest H. Meyer, 84 Fed. (2d) 496, 497;
Silver Line v. United States, 94 Fed. (2d) 754, 757;
The Catalina, 18 Fed. Supp. 461, aff'd. 95 Fed. (2d) 283.

Under these cases, any speed was excessive if the SAKITO could not stop within half the distance of visibility. She demonstrated she could not stop within the *whole distance.*

The SAKITO's master and chief officer found themselves in a very uncomfortable dilemma. They had to admit either that their speed was excessive or their lookout was woefully deficient. They chose, as the lesser of

two evils, to admit the former, and claimed that it was due to their own inability to estimate the visibility correctly. Yokota said that when the lookout reported the OLYMPIC ahead, he estimated the visibility at between 500 and 600 meters. [A. II, pp. 867-8.] That was a mistake, he admitted, because when he saw the OLYMPIC 200 meters ahead, he then realized he could not see that far. [*Id.* pp. 886-7.] Captain Sato, who testified at the trial three months later, said that just before the OLYMPIC was sighted he estimated the visibility at about 300 meters. [A. III, p. 1113.] He also admitted an erroneous estimate. [*Id.* p. 1276.]

It seems to us that if these high officers could not estimate visibility any closer than that, they are a pretty serious "peril of the sea" in themselves. If vessels are to be run on the assumption that the visibility is two or three times what it actually is, there is grave danger for other vessels so unfortunate as to be in their paths.

Yet counsel for the SAKITO insisted in the trial court and still insist here, that these overestimates are excusable. The officers, they say, made an honest mistake. They used their best judgment; it was all the judgment they had. The fault, say counsel, was a venial one, and the SAKITO should not be held liable for it unless it was a fault which a prudent navigator would not make. (Br. pp. 40, 62.)

A prudent navigator, we submit, does not take 12,000 tons of ship into a fog, approaching a busy port, and proceed on "estimates" of visibility. If he does not *know* what the visibility is, he does not proceed. Anyone who so proceeds without absolutely knowing the visibility and

that he can stop his vessel within the range of sight is negligent.

Counsel has cited *The Old Reliable* (C. C. A. 3), 269 Fed. 729 (Br. p. 40). In deciding that case the court said (p. 729):

> "It is not 'inevitable accident' when a master proceeds carelessly, and afterward circumstances arise when it is too late and impossible for him to do what is fit and proper to be done."

Even if we take the SAKITO's alleged 6 mile speed as literally accurate, she was negligent by all standards of safe navigation in the manner and the speed at which she was proceeding. Her evidence even shocked her own expert, Captain Arthur, whom counsel evidently had not intended to be examined on that aspect of the case.

This witness was given a hypothetical question, reconstructing the situation according to the SAKITO's testimony. He testified [A. III, pp. 1234-5]:

> "A. In that case, if I had a fix an hour before, I would just keep feeling my way on up to the breakwater.
>
> The Court: What do you mean by feeling your way? A. Go slow, or stop and listen, and keep on going a little more, feeling as I went along.
>
> Q. How fast do you travel when you say you feel your way? A. Two or three knots an hour at the most, maybe stopped most of the time.
>
> Q. In other words, it is dangerous to proceed under those circumstances? A. That's right. You must keep your ship under control at all times.
>
> Q. Would you say that six knots an hour would be pretty fast under those circumstances? A. I would, yes."

Counsel's "mistake in judgment" theory is ingenuous, but it is just the old "didn't know it was loaded" excuse. The conduct of the officers is not to be tested by their own judgment, but by the standards of reasonable men. The trial court shortly disposed of the argument by the quotation from *The Germanic* (*Oceanic Steam Navigation Co. v. Aitken*), 196 U. S. 589, 25 S. Ct. 317, which appears at A. I, pp. 122-3.

It is also argued (Br. pp. 35-40) that the rule of sight does not apply when the other vessel does not cooperate in her own navigation and in the giving of signals. The rule of sight, of course, contemplates that the other vessel shall also obey the law as to speed and probably as to sound signals. But the OLYMPIC was not making speed. She was anchored. And, assuming her failure to give proper sound signals would excuse the SAKITO from compliance with the rule of sight, we have ample evidence and the trial court's finding that she *did not fail* in that respect and *was* sounding proper signals.

Of course, the actual visibility was very much greater than the 200 meters claimed by the SAKITO. So also was the SAKITO's speed greater than the 6 to 6½ miles per hour claimed by her witnesses. The trial court found her speed to be "at least 8 miles per hour" when she sighted the OLYMPIC at 7:09, and pointed to other evidence from which that figure was said to be conservative. [A. I, pp. 123-4.]

A number of witnesses with sea experience, qualifying them to judge the speed of moving vessels, saw the SAKITO approach the OLYMPIC and estimated her speed variously from 9 to 12 miles per hour. The trial court, however, preferred to take the evidence of the SAKITO's own navi-

gation and engine room records, which indicate that at 7:09 the SAKITO was moving at approximately 12 miles per hour.

By the SAKITO'S own navigation fixes, duly pricked down on her working chart, her 7:00 A. M. position was just two miles from the OLYMPIC'S position at anchor. [Sakito's Ex. K, A. III, p. 1164.] We had Captain Sato fix on the chart, by dead reckoning, her positions at 7:03, when she slowed her engines, and at 7:06, when she had fully decelerated her speed through the water to 6½ knots. The position at 7:06 was ¾ of a mile from the OLYMPIC'S position, and she covered that 4560 feet (less 200 meters or 650 feet) between 7:06 and 7:09. Her speed during that time must have been 1300 feet a minute or close to 13 miles per hour. We grant the possibility of reasonable error in getting the 7:00 A. M. position from a beam fix on Catalina Island South Light at 6:00 A. M., but the error, if any, might as easily work against the SAKITO'S contentions as for them. The court made due allowances for such error in the SAKITO'S favor when he found her speed to be 8 miles per hour at least.

Her engine room records also contradict her testimony that at 7:03 her engine speed was reduced to 50 revolutions per minute, and that they were turning at 50 revolutions at 7:09. Readings from her revolution counters, taken during the 12:00 to 4:00 watch, while the vessel was making her steady full speed of 16 miles, show an average of 117.7 per minute. She maintained the same engine speed during the next watch until 7:03, when the engine speed was reduced. She ran at reduced revolutions until 7:09, when she sighted the OLYMPIC and her engines were reversed. A record of the reading of the

revolution counters was taken at 7:09. From this we computed that between 7:03 and 7:09 she turned 501 revolutions at reduced speed or an average of 83.5 per minute.

Counsel for SAKITO do not dispute these calculations, so we have not set them out at length. They say, however, in the footnote on page 63 of their brief, that "nice calculations based on a fix 65 minutes earlier" should not be considered in determining either her 7:03 position or her speed thereafter. But, as we have said heretofore, the fixes and positions are the SAKITO's own, and granting the possibility of reasonable error in the 7:00 A. M. position, the court gave the SAKITO the benefit of the assumption that the error was in her favor.

It is said that the SAKITO was proceding into a head wind, force 1, and the tide was affecting her. Force 1, according to the Beaufort Scale, is from 1 to 3 miles per hour, and is not sufficient to move a wind vane. The direction of the wind is only shown by smoke drift. (Knight, Modern Seamanship, 10th Ed., p. 673.) The tide or currents, if any, on the open ocean were just as likely to work with her as against her.

We think the trial court was generous with the SAKITO in finding that her speed at 7:09 was 8 miles per hour at least, and certainly it cannot be said that that finding is not fully supported by the *weight* of evidence.

The SAKITO has not furnished us with any figures as to her stopping abilities at a speed of 8 miles or more. but it is elementary that stopping distances increase in proportion as speed increases. At 8 miles or better the picture is all the worse for her. Whatever the actual

visibility was, the SAKITO could not stop or otherwise avoid collision in the distance she *did* see ahead, which brings us again to one of two inevitable conclusions,—immoderate speed or faulty lookout.

D. THE SAKITO MARU'S LOOKOUT.

We think that whatever the SAKITO speed was, she could have stopped or at least maneuvered so as to have avoided collision with the OLYMPIC if anyone on board had been keeping any kind of watch. The trial court found the visibility to have been 1800 feet, which is over three and one-half of the SAKITO'S own lengths.

We have seen also that the OLYMPIC'S bell was audible for more than half a mile and was being sounded in regular peals of five seconds duration, each minute. The other barges also were ringing their bells.

The trial court found as to the SAKITO'S lookout:

> "The 'Sakito Maru' is charged with the fault of not having an effective lookout. The evidence as to whether or not a lookout was posted at her bow is very conflicting, but I am accepting the testimony of those on board of the 'Sakito Maru', that a lookout was on duty. I appreciate the fact that many witnesses testified that they saw no lookout, but I am inclined to accept the positive in place of the negative testimony.
>
> But in view of my findings heretofore expressed on the visibility, it is quite apparent, that the lookout was a lookout in name only. He was charged with the responsibility of seeing that which was within his vision. This he failed to do. If he had been an efficient lookout, the collision easily could have been avoided and this failure of the lookout must be

charged as a gross fault against the 'Sakito Maru'. (The Catalina, 18 F. Supp. 461 and cases therein cited.)" [A. I, p. 124.]

We must accept the court's finding that a lookout was posted on the SAKITO's forecastle head, but it is evident that the court felt the matter was left in some doubt. The lookout has told us that he was standing on a platform at the meeting of the bow plates and that the bulwarks came about to the height of his navel., [A. II, p. 953.] His head and shoulders, and most of his torso. would project above the bulwarks. Half a dozen witnesses had a clear view of the SAKITO's bows as she approached the OLYMPIC, of which several were experienced seamen who knew where a lookout should be posted and were consciously looking for him. [Grothe, A. I, pp. 431-2; Jones, A. II, p. 486; Harris, *id.* pp. 515-6; Johnson, *id.* p. 561; Walters, *id.* p. 652; Stiles, *id.* p. 737.] It seems to us that this is positive, not negative, testimony, for if the lookout had been posted as claimed these witnesses could not possibly have overlooked him.

But, accepting the finding that he was properly posted, it is obvious that he was of no more use as a lookout than a wooden figurehead. When he first saw the OLYMPIC she was so close that he could see people fishing on her deck. That is about all he did know. He did not know how far ahead the OLYMPIC was or how long it was between seeing her and the collision, and he did not hear any bells until after he saw the people on deck. [A. II, pp. 947-954.] The watch officers were equally incapable of seeing what was to be seen or hearing what was to be heard. Although their position was possibly less favor-

able for observation than that of the lookout, they knew that they were very close to the entrance of the harbor and should have been acutely conscious of the possibility of encountering anchored or moving vessels in the fog.

We submit, it is unescapable from the evidence that all those keeping watch on the SAKITO's bridge and forecastle head should have heard the OLYMPIC's bell at least a half mile away, and should have seen the OLYMPIC and ascertained her condition at least 1800 feet or within four of the SAKITO's lengths.

We know that they did not see or hear her until 1½ minutes and 650 feet before the collision. That time is fixed by the start of her admitted swing to starboard. Many witnesses on other vessels saw and heard the SAKITO minutes before that turn was initiated.

Said the United States Supreme Court in *The Colorado,* 91 U. S. 692; 697:

> "Lookouts are valueless unless they are properly stationed and diligently employed in the performance of their duty; and if they are not, and in consequence of their neglect, the approaching vessel is not seen in season to prevent a collision, the fault is properly chargeable to the vessel and will render her liable, unless the other vessel is guilty of violating the rules of navigation."

When those on a vessel do not hear fog signals properly sounded, the presumption is to be indulged that they were not attending strictly to their duties.

> *The Lutcher Brown* (C. C. A. 5), 41 Fed. (2d) 176.

Counsel make little or no attempt to defend the SAKITO's incompetent lookout, saying merely that the finding must fall if visibility is determined to be approximately 200 meters. (Br. 58.)

> "Every doubt as to the performance of the duty (lookout) and the effect of non-performance should be resolved against the vessel sought to be inculpated until she vindicates herself by testimony conclusive to the contrary."
>
> *The Ariadne,* 13 Wall. 475; 20 L. Ed. 542.

The SAKITO, we submit, did not even begin to sustain the burden.

E. THE SAKITO MARU'S MANEUVERS.

Counsel say that the maneuvers of the SAKITO before the collision and after the OLYMPIC was sighted were skillful and in accordance with the practices of good seamanship. (Br. 64.)

They could not very well have been worse! Confused and bewildered when the OLYMPIC was sighted near the SAKITO's course, the SAKITO's master did exactly the wrong thing. He put his rudder to starboard instead of to port, turned directly into the OLYMPIC instead of away from her, and practically cut her in two, instead of striking a glancing blow with the bluff of the SAKITO's starboard bow. Error *in extremis* no doubt, but one which was directly brought about by the high speed and the deficient lookout, who failed to discover the OLYMPIC in time for considered and intelligent navigation.

The SAKITO's testimony that OLYMPIC, when sighted, was dead ahead and at right angles to the SAKITO's

course, is demonstrably false. She might have been dead ahead or nearly so, but the angle of the approach was far from a right angle. Most of the observers in a position to see stated that she came up on the OLYMPIC's port quarter, and the angles of impact, as measured by Mr. Alderson, Lloyd's surveyor, show that even after the SAKITO's ten degree turn to starboard she struck the OLYMPIC at least eleven degrees short of a right angle. [A. III, p. 1385.] But the admitted headings of the two vessels are sufficient to show the angle of the SAKITO's approach. Her course was 340° true. The OLYMPIC's heading was due west magnetic or 285° true, subject to the possibility of a swing of one point either way due to the slack of the stern anchor chains. The angle of approach was therefore between 45° and 65° of the OLYMPIC's heading.

It is perfectly plain to anyone with the most elementary knowledge of how a ship handles that if the SAKITO, on her course of 340° true, had been proceeding at a reasonable speed under existing conditions, and had sighted the OLYMPIC 1800 feet away, she should easily have avoided the OLYMPIC by a hard left rudder, with yards to spare. (See the turning curves in Admiral Knight's Modern Seamanship, 10th Ed., p. 502.) There would have been ample time so to avoid her, even after observation and reflection. But, as Captain Sato did not become aware of her presence until that distance had shrunk to a good deal less than half, he did not have time for either observation or reflection. He did not even determine her heading or whether or not she was moving or anchored, until after he had "instinctively" ordered "hard right" and turned the SAKITO toward instead of away from

the OLYMPIC. [A. III, pp. 1228; 1237.] He always has a "policy" to go to the right. [*Id.* p. 1119.] If so, it is a very bad policy when he does not even know the *heading* of the other vessel. We have that policy to thank, as well as the excessive speed and deficient lookout, for the loss of the OLYMPIC.

We do not mean to say that when nothing was done until the vessels were only 200 meters apart, a turn to port instead of to starboard would necessarily have avoided the collision entirely, but it would very nearly have done so and, at worst, there would have been only a sideswipe or a glancing blow.

We should observe at this point that we twice demanded the production of the plots of the SAKITO's turning curves. The first time was upon the taking of Yokota's deposition when the SAKITO was in Los Angeles. The second time was at the trial, when counsel replied that it was aboard the ship and that he did not consider it a matter of major importance. [A. III, pp. 1122, 1124.]

It is urged, in effect (Br. 68), that nothing should be considered in this case but the judgment of Captain Sato, whose training, qualifications and experience are highly vaunted. It does not seem to us that his performances in this situation come up to his press notices. We submit, with all confidence, that the SAKITO's faults in immoderate speed, inadequate lookout and in improvident maneuvers after the danger was tardily discovered, are established by the great weight of the evidence, and of themselves fully and completely account for the collision and its consequences.

II.
Faults Charged Against the OLYMPIC II.

A. Olympic II's Place of Anchorage.

The Olympic's place of anchorage was 3.2 miles to seaward of the Los Angeles Breakwater, bearing 160° true from the light. That is close enough for any purpose of this case, for any criticism of her position which can be made would apply equally to any other position within the radius of a mile.

That she was clear out on the open sea is apparent from any chart. There was no channel, or shoals or range courses within miles of her, and the ocean was absolutely unobstructed. The point of her anchorage was within United States territorial waters in the sense that she was less than 3 miles to seaward of a line drawn from Point Firmin to the now obliterated Point Lasuen, (*United States v. Carrillo,* 13 Fed. Supp. 121), but none of the area to seaward of the breakwater had ever been prohibited for anchorage. Since the collision happened a large area has been established as a defensive sea area, and is so marked on some of the charts used in evidence. [See Charts at A. II, pp. 982, 1056.] That area was established sometime in 1941, and is purely for purposes of national defense.

The Olympic was anchored on a deep lying reef known as Horseshoe Kelp, which is one of the best known and longest used ocean fishing grounds on the Southern California coast. It is a place of resort for fishing craft of all kinds and, day and night, in season and out, fishing vessels from the size of the Olympic down to small launches fish there at anchor and drifting. On Sundays

and holidays during the sport fishing season they run into the hundreds. Fishing barges like the OLYMPIC have anchored there during the summer season for years. The trial judge recalled that he had fished from a barge on Horseshoe Kelp twenty years before the trial. [A. III, p. 1396.] Almost every local witness who was called by either side testified as to the fishing activities on Horseshoe Kelp and their continuous existence for as long as the witness had lived in Los Angeles. Captain Arthur, SAKITO'S expert witness, testified that it was notorious to mariners visiting the port that there was a fishing ground at that point, and that fishing barges were generally anchored there. [A. III, pp. 1336-8.]

The area generally is that in which vessels bound to or from the south pick up and drop their pilots, and where, inbound, they must anchor and wait for a pilot. The pilots meet them from one to six or seven miles off the breakwater, although generally much nearer to the breakwater than the position of the OLYMPIC. [A. II, pp. 635-6.]

Vessels approaching Los Angeles from the south, particularly if they do not call at San Diego, pass close to Horseshoe Kelp and sometimes even over it. They frequently passed close to the anchored barges, sometimes to the eastward and sometimes to the westward. The Coast Pilot recommends that vessels approaching Los Angeles in a fog and unsure of their position steer well to the eastward of the breakwater and come in on the 10 fathom curve. (Coast Pilot, 1934 Ed., p. 28.) Any vessel following this direction would pass the fishing grounds miles to the eastward. [See 10 fathom curve as plotted on chart at A. III, p. 1056.] But northbound vessels which

proceed straight for the breakwater, from a departure point outside of the Coronado Islands, will often pass closs to Horseshoe Kelp.

The ocean area in the Gulf of Catalina and San Pedro channel is constantly patroled, and traffic therein closely supervised by the Coast Guard. Assuming that Horseshoe Kelp is within territorial waters, under the decision in *United States v. Carrillo* (*supra*), the Secretary of War has authority to close the area to anchorage if fishing therein is deemed a hazard to navigation. (33 U. S. C. A. 1.) The area was never so closed and, unless the toe of the shoe falls within the newly established Defensive Sea Area, it is not closed to anchorage now.

The trial court found that the OLYMPIC was anchored on the open sea and not in the vicinity of any channel or fairway, but was surrounded by miles of navigable water. [A. I, pp. 114-5.] It held that the place of anchorage was proper and permissible, and that the OLYMPIC was not anchored there in violation of the statute (33 U. S. C. A. Sec. 409), which only prohibits anchorage in a navigable channel when it prevents or obstructs the passage of other vessels, which the OLYMPIC did not do. [*Id.* pp. 127-8.]

The facts above recited are undisputed, and the court's holding is in accordance with all authority.

Counsel for the SAKITO bitterly scold at the OLYMPIC and the two other barges for conducting their operations on Horseshoe Kelp, saying that they were "purprestures" (a frightening word) across the path of vessels bound for Los Angeles; that they converted a portion of the sea lane into a "private anchorage ground" (Br. 22);

that they, *with their anchor chains,* created an obstruction directly across the steamer lanes extending for half a mile (Br. 22; 28); that they and the OLYMPIC obstructed a navigable channel in violation of the anchorage statute (33 U. S. C. A. 409); and that quite apart from the statute the OLYMPIC was a "maritime nuisance." (Br. 32.)

Counsel are entitled to some hyperbole in argument, but when imagination soars to the height of visualizing two relatively small vessels abreast and another 1600 yards astern as an obstruction extending for half a mile, one must cry a halt. Anchor chains do not float nor, on a windless, tideless sea, do they stretch like a taut clothesline between anchor and ship. If the author of the SAKITO's brief will look at the photographs of the OLYMPIC which are in evidence (OLYMPIC's Exs. 1 and 2) he will discover how a vessel's anchor chains lead from hawse pipe to bottom, and discover that the anchors and chains of the barges added very little to the length of the vessels in the way of an obstruction to navigation.

Upon the authority of *Eastern Transportation Co. v. United States,* 29 Fed. (2d) 588 and *The Lehigh,* 12 Fed. Supp. 75, counsel assert (Br. 32) that a "navigable channel," within the meaning of the anchorage statute, applies to any navigable waters of the United States, including, apparently, all coastal waters to the three mile limit, whether in or near a harbor or not. That is a severe strain on the language of the cases, but it is easier to accept that construction than to take space to contradict it. By hypothesis then, the OLYMPIC's position three miles from the Los Angeles Breakwater was in a "navigable channel" about twenty miles wide. Counsel say,

therefore, she obstructed that channel, as denounced by the anchorage statute.

The statute (33 U. S. C. A. 409) has a dual aspect. It prohibits anchorage in navigable channels which prevents or obstructs the passage of vessels, and it makes unlawful (unqualifiedly) the failure to mark a wreck sunk in a navigable channel. We are hardly concerned with the latter aspect, so that disposes of *Eastern Transportation Co. v. United States* (*supra*).

The anchorage aspect of the statute does not prohibit anchorage absolutely, but only where it *prevents or obstructs the passage of other vessels.* Of course, any anchored vessel obstructs passage to the extent of her physical bulk, but, as statutes are usually given a sensible construction, it has been held under this one that when a vessel anchors in a navigable channel, even a physically narrow one, she does not violate the statute if she leaves room so that other vessels, in the exercise of reasonable care, can get by her with convenience and safety.

The Virginia Ehrman, 97 U. S. 309; 314;

The Boston Maru (C. C. A. 9), 20 Fed. (2d) 508;

The Europe (C. C. A. 9), 190 Fed. 475;

The Bright (C. C. A. 4), 124 Fed. (2d) 45;

The Hesperos (C. C. A. 4), 265 Fed. 921;

The John G. McCullough (E. D. Va.), 232 Fed. 637;

Le Lion (E. D. Pa.), 84 Fed. 1011.

This court in *The Europe* (*supra*) said of a vessel anchored in theWillamette River near Portland:

> "The argument based upon the first and third grounds, as stated above, is completely refuted by the decision of the Supreme Court in the case of The Oregon, 158 U. S. 186. On the authority of that case, we hold the law to be settled that an ocean-going vessel may lawfully lie at anchor in the night-time in the deep channel of a navigable river, if not so placed as to prevent or obstruct the passage of other vessels, in violation of the act of Congress prohibiting such obstruction. (Citing statute.) We also hold that the words 'prevent or obstruct', in this statute, are positive words indicative of limited restraint and of legislative intent to not interfere with the right use of waterways by imposing an absolute or unreasonable prohibition; . . ." (p. 478).

In *The Virginia Ehrman* (*supra*) the Supreme Court applied the same rule to a dredged channel only a few hundred feet wide. In *The Boston Maru* (*supra*) the situs was the lower Columbia River; others were channels in Chesapeake Bay and Delaware Bay, which were four miles or more wide. In *The Bright* (*supra*), about the last word on the subject, the court said:

> "If a vessel anchors at a point in the channel where, notwithstanding such anchorage, other vessels navigated with the care the situation requires can safely pass, then she has neither violated the statute nor rendered herself liable under the general rules applicable to navigation, even though she has to a certain extent obstructed the channel." (p. 46).

The statute, carried to the extent urged by counsel, would prohibit a vessel anchoring anywhere within the

three mile limit, and would be a monstrous absurdity. We have never seen a case where a vessel was held in fault for a violation of this statute unless she was physically blocking a channel or harbor entrance, or a range course between aids to navigation. All of the SAKITO's authorities are of that character. (Br. 33.)

In *The Lehigh,* 12 Fed. Supp. 75, a tug with a tow nearly 3000 feet long anchored in a dense fog, within a half mile of the entrance to the 400 foot dredged channel leading out of Lake Erie into the Detroit River, with her tows tailing right across the entrance. The vessels were improperly lighted, had no lookouts and gave no warnings. The court found that, so anchored, the flotilla actually hindered and impeded navigation and was anchored in such a manner as to prevent or obstruct the passage of other vessels.

In *The Admiral Schley,* 131 Fed. 433, a tug with a long tow was "loitering" across the entrance to Boston harbor. Apparently she was held in fault for "loitering," as the court intimated that if she had been engaged in a passage she might have been within her right in crossing the harbor mouth.

In *The Persian,* 181 Fed. 439, there was a collision between a vessel anchored on a range course in a fog and a vessel picking its way between the range buoys and beacons, which were less than two miles apart. The area was full of shoals on both sides of the buoyed channel, and the moving vessel had to proceed by compass and lead with meticulous care, picking up and leaving each aid to navigation within a few hundred feet. The anchored vessel had found the going too difficult and, as she said, had moved a half mile into the open sea and

anchored. The trial court accepted this testimony and exonerated her. The appellate court reexamined the evidence and found that the anchored vessel had not moved off the range course, but was directly upon it. The appellate court said:

> "Bits of testimony found here and there in the record indicate that navigators appreciate the importance of leaving the fairway on ranges unobstructed, where navigation is as confined as it is in this locality." (p. 447).

The OLYMPIC was over three miles from the harbor entrance, she was not on or near a range course, and the only part of the ocean she obstructed was that covered by her own length and breadth. The SAKITO had the whole area between Catalina and the mainland in which to avoid her. The OLYMPIC was literally on the open sea.

Counsel for the SAKITO abuse the OLYMPIC and her owners for daring to anchor her on Horseshoe Kelp, as if she were some sort of outlaw. Their point of view is apparently that a fishing barge or a fishing vessel of any kind has no right on the ocean except by sufferance. Their attitude, we submit, is arrogant and childish. The OLYMPIC'S occupation was a humble one, but she had the same right to pursue it on the ocean as the SAKITO had to pursue hers. While Horseshoe Kelp may be near the steamer lanes, counsel fail to remember that it was there and the fish were on it long before there were any steamer lanes or any SAKITO. Steamers may go where they will, but a vessel whose occupation is fishing must go where the fish are.

It is no novelty for fishing banks to exist near the paths of commerce. The products of the great banks of the North Sea, the Adriatic and the North Atlantic are a vital food supply for the world and a source of employment for the seafarers of littoral nations. The fishermen of the world are protected in the right to pursue their occupation on the sea by international law.

> "Sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, lines or trawls. This rule shall not give to any vessel or boat engaged in fishing the right of obstructing a fairway used by vessels other than fishing vessels or boats."
>
> *International Rules,* Art. 26.

The Inland Rule is identical.

> "This article is but a codification of the unwritten law of the sea prevailing before the present rules were formulated, that a free vessel must keep out of the way of fishing vessels or boats encumbered by having out nets, trawls or lines. The article makes mention only of the duty of sailing vessels in respect to other sailing vessels or boats fishing. The same duty, however, is imposed upon free steamers in respect to steam vessels fishing.
>
> 'Fairway', as used in this article, is clearly intended to signify narrow waters through which vessels must pass. It is not applicable to fairways in the open sea."
>
> *LaBoyteaux, Rules of the Road at Sea,* p. 167.

> "Fishing boats have a right to fish on the high sea and to be fast to their nets, whether their fishing ground is in the track of ships or not. It is the

duty of other ships to take greater precautions when passing over a fishing ground, so as to keep clear of fishing boats and not make them cast off from their nets."

Marsden, Collisions at Sea, 8th Ed., p. 464.

In the following cases, moving vessels, steam and sail, have been held liable under Article 26 or by analogy to it, for running down vessels engaged in fishing:

The Albatross (C. C. A. 9), 20 Fed. (2d) 17;

The Virginia & Joan (C. C. A. 1), 86 Fed. (2d) 259;

The Marshall O. Wells, 172 Fed. 984; aff'd (C. C. A. 3), 178 Fed. 918;

The Jean Jadot (E. D. N. Y.), 2 Fed. Supp. 942.

In *The Marshall O. Wells* (*supra*), the court said:

"The proofs satisfy us that decedent's power boat was anchored for fishing in a proper place and in plain view of the approaching schooner; that there was ample fairway room for the latter to pass; that a horn was blown on the fishing boat as the schooner approached; that the power boat was in no fault; that the schooner could have seen the fishing boat and heard the horn in ample time to avoid the collision, had she had a lookout. By rule 26, providing that 'sailing vessels under way shall keep out of the way of sailing vessels or boats fishing with nets, or lines or trawls,' the schooner was in fault in making no effort to avoid decedent's fishing boat, which, as we have seen, left ample fairway space for the schooner." (p. 919).

The trial court held that it was "doubtful" whether the OLYMPIC could be classed as a fishing vessel within the meaning of Article 26 of the International Rules. [A. I, p. 128.] We do not see why she should not be so classed. She was certainly fishing and she certainly had lines out, as any lookout on the SAKITO, with eyes in his head, could readily have determined. But we do not press the point, for the duty was the same upon the SAKITO whether the OLYMPIC was a fishing vessel or merely an anchored vessel. She is obligated to keep clear of the former by international rule, and of the latter by the general law.

Whether the OLYMPIC was a fishing vessel, a pleasure craft or a maritime nondescript with no visible means of support, she had as much right to her share of the ocean as the proudest merchant vessel afloat, and was bound and protected by the same laws as was the SAKITO.

The SAKITO's whole case on the charge of improper anchorage consists of the opinions of Captain Sato (of the SAKITO), Captain Arthur and Monyhan, a coast guard boatswain. They testified that in their opinions the OLYMPIC's place of anchorage was dangerous, or dangerously close to the sea lanes.

Assuming that this was a proper matter for expert testimony, the trial court undoubtedly gave it the weight to which it was entitled and found that the place was a proper one notwithstanding. Sato's opinion was without any foundation of local knowledge and was worthless, biased or not. Captain Arthur, an undoubtedly honest and sincere witness, had only one point of view,—that of the commercial navigator. To him that was the only im-

portant use of the sea, and fishing vessels were "nuisances." The boatswain, Monyhan, was undoubtedly called to suggest official disapproval of the OLYMPIC and her ilk. If such disapproval had existed in fact, counsel for the SAKITO would not have had to send across the continent for the testimony of a transferred warrant officer to voice it.

We do not have to excuse or apologize for the OLYMPIC's place of anchorage, for she had the right to be there. We submit that any vessel is entitled to anchor and fish on any well established fishing ground at sea, and if she obeys the law and sounds the signals required of a vessel at anchor she is absolutely without fault. The trial court well said that to hold otherwise would preclude fishermen at any time from anchoring on the open, unobstructed ocean. [A. I, p. 130.]

B. THE OLYMPIC II'S SOUND SIGNALS.

The trial court held that the evidence was "overwelming" that the OLYMPIC sounded proper fog signals, and in a previous subdivision we have summarized the evidence in support of that finding. That evidence fully disposes of what counsel term the "factual questions." (Br. 19-22.) The signals given were those required by law. (International Rule, Art. 15 (d).)

The case was tried by both sides on the theory that the signals required of the OLYMPIC were those of a vessel at anchor, but we are now confronted with a new claim to the effect that the OLYMPIC should have sounded some other kind of signals,—those of a "moored vessel" or some signals "apppropriate to her position;" or, being a fishing

vessel with lines out, she should have sounded the signals provided by International Rule, Article 9(i).

These points were not raised or pleaded at the trial or passed upon by the trial court, and are not covered by any assignment of error, unless assignment No. XII [A. I, p. 252] be deemed a catchall. The tardy raising of these points seems to bring them squarely within the rule that an appellate court will not consider points not raised in the court below.

The Golden Gate (C. C. A. 9), 52 Fed. (2d) 397, 399;

Anderson v. Alaska S.S. Co. (C. C. A. 9), 22 Fed. (2d) 532; 536.

But they are entirely lacking in merit. We know of no signal permissible for any vessel which is at anchor but the bell signals provided by Article 15(d). Counsel say that the OLYMPIC "was not lying at anchor," apparently because she had both a bow and stern anchor, and was held by the latter to a westerly heading. (It is also inferred that with her bow and stern anchor chains she was something over 1000 feet long.) The argument is, evidently, that she was a moored vessel and should have made some other sort of signals. Counsel do not say what sort of signals they think she should have given in that situation.

It has been held in the Second Circuit that vessels moored to the ends of piers in a fog must give some kind of signals, and, as counsel admit (Br. p. 24), the signal of an anchored vessel by bell is regarded as entirely sufficient.

The Youngstown, 40 Fed. (2d) 420, 421;

Wright and Cobb Lighterage Co. v. New England Nav. Co., 204 Fed. 762.

So, moored or anchored, the OLYMPIC complied with legal requirements.

We hardly need add that the OLYMPIC's anchor chains did not add very much to the obstruction created by her hull, nor are we greatly impressed by the suggestion that Mr. Johnson's fishline presented a 200-yard additional obstacle to an approaching vessel. (Br. p. 26.)

We know of no rule which prohibits a vessel from anchoring bow and stern, or which requires any vessel so anchored to give any special signal. Conceding the possibility that under some conceivable circumstances anchoring bow and stern might be imprudent seamanship, we can find no such circumstances in this case. And, assuming it were possible for her to have led the SAKITO into an erroneous assumption because she was headed west instead of tailing to the force 1 wind, she did not so mislead the SAKITO, for SAKITO's navigators did not see the OLYMPIC in time to be either led or misled. They did not claim that they were misled in any respect, and hardly could when they admit that they did not see or hear the OLYMPIC until the SAKITO was a bare 200 meters away from her. Captain Sato admitted that he did not even know *how* she was heading until after he had turned the SAKITO directly into her. [A. III, pp. 1226-29.]

As to the idea that the OLYMPIC should have sounded both whistle or horn *and* bell, as required by Article 9(i) (Br. pp. 25-6), it is fully apparent that Article 9(i) deals with fishing vessels under way or adrift. When a fishing vessel is *anchored* she gives the signals of an anchored vessel. Article 9(h) provides for the analogous situation when fishing gear is fast to a rock and the vessel becomes *stationary*. Then she is required to give the signals of a vessel at anchor.

We wish very much that counsel had told the court what permissible signal the OLYMPIC could have given which would have told the SAKITO anything more than the OLYMPIC's bell would have told her had she been listening for it. In the trial briefs, counsel argued that as soon as the SAKITO's first whistle had been heard, the OLYMPIC should have started and continued a steady clamor on the bell, and continued it up to the collision. That contention is not expressly pressed now, but if that is what counsel mean by sounding a signal "appropriate to her position", there is a very short answer to it.

The law requires fog signals by whistle and bell to be made at intervals. The purpose is obvious. If, upon the hearing of a fog signal every vessel in the vicinity sent up a clamor of constant noise, nothing could be intelligently interpreted. The giving of unorthodox signals, except *in extremis,* was fully considered in *The Oregon,* 158 U. S. 186; 202-3, and in *The Admiral Schley* (C. C. A. 1), 131 Fed. 433; 437.

It is submitted that no legitimate criticism can be made either of the signals which the OLYMPIC gave or her manner of giving them.

C. THE OLYMPIC II DID NOT "GIVE CHAIN" OR CAST OFF HER ANCHORS.

This claim of fault was not pleaded or referred to in the trial court nor is any assignment predicated upon it. It never occurred to any of the SAKITO's witnesses nor to the very resourceful proctor who tried the case for SAKITO that there was any remote possibility of the OLYMPIC doing anything to avoid collision in this regard. Yet, in their brief here, the SAKITO's counsel persistently insinuate the idea that the OLYMPIC was at fault for not

acquiring sudden powers of locomotion or levitation and removing herself from the SAKITO's path. (Br. pp. 25; 36; 37; 45.) On the latter page it is said that the OLYMPIC's "fundamental fault" was in her general unpreparedness to *remove herself* or to take steps in avoidance of anticipatable dangers in fog.

The OLYMPIC was anchored on a calm sea, with a wind hardly capable of filling a small boat's sail. (We wonder where counsel got the Beaufort Scale which shows force 1 as approximately 7 knots per hour. (Br. p. 5).) This wind (from the northeast) and the tide which, if it were perceptible at all, was running seaward, could not have moved the OLYMPIC any perceptible distance in five or ten minutes, and, assuming they would move her at all, it could only be in one direction—*toward* the approaching SAKITO.

So, if the OLYMPIC had been able, in a flash, to free herself from her anchors and chains when the SAKITO came in sight, there was no conceivable chance for her to have avoided the oncoming vessel, and if any significant drift were possible, it would only have taken her toward the SAKITO and shortened, to a microscopic extent, the distance within which the SAKITO could have avoided her.

There are cases such as the two cited in the SAKITO's brief, page 25, where powered vessels have been held in fault for failing to give chain or come up on their anchors to avoid a vessel dragging or drifting down upon them, but we have never heard of a vessel which was held in fault for failing so to avoid a vessel which turns toward her at an eight-mile speed, a few hundred feet away. It was certainly not a fault that the OLYMPIC was not a powered vessel, and without power and the opportunity to use it she could not have budged from her place. Even if

she had been fully powered and ready to use it, it would have been impossible for her to get under way in the time available.

Interlake S.S. Co. v. Great Lakes Trans. Co. (C. C. A. 2), 89 Fed. (2d) 694, 696.

D. The Olympic's Lookout.

The gist of the criticism of the Olympic's lookout (Br. pp. 41-5) seems to be that counsel do not like him and that he was a bad witness. Counsel say (*id.* pp. 41-2) that in the Olympic's situation there was nothing a lookout could do but give proper signals and more vigorously employ them when danger approached. The evidence shows conclusively and the court found that Ohiser, the lookout, did exactly that and did it beyond criticism. Yet counsel go on for four printed pages, blackguarding Ohiser for everything else under the sun, without a single suggestion as in what respect, if any, they claim he failed as a lookout.

We can find nothing inconsistent with the fact that Ohiser faithfully discharged his duties as lookout, in the assertion that he worked overtime to help his shipmates out, or that he had his breakfast at 6:30, or that he thought he heard a ship's propellors, or that he could not accurately estimate time or angles, or that he did not time his bells with a stopwatch or that he stopped ringing them when it was not foggy. Granting that he was a bad witness and easily confused, the manner of performance of his duties did not depend on his testimony alone. It was fully corroborated. The trial court was well aware of his deficiencies as a witness and made full allowance for them.

The evidence is clear and overwhelming that he was on lookout and paying exclusive attention to looking out

at all times after 6:45 or thereabouts, and was ringing the regular peals required by the statute, without cessation, until the SAKITO turned toward the OLYMPIC. Then he rang a steady alarm peal until he was literally driven from his post by the SAKITO's prow. He heard what must have been the first of the SAKITO's fog whistles and was keeping close watch to seaward when he saw her take shape out of the mists, evidently at about the same time she was seen by Johnson, fisherman on the OLYMPIC, and Grothe and Walters on the MAR-ELL. That was as soon as anybody could see her. What more could be asked of the most competent lookout in a like situation?

Counsel say that the duties of lookout must be undivided, citing the familiar *Ariadne* and recent decisions by this court. (Br. p. 43.) We presume counsel refer to the fact that Ohiser was the bell ringer as well as the lookout. The stern burdens of the *Ariadne* rule are not, we think, to be applied literally in the case of a vessel at anchor and incapable of movement; but, assuming they are, wherein did Ohiser fail? And unless our sea lore is very much out of joint, the anchor watch on most vessels combines the duties of lookout and bellringer, and on sailing vessels the lookout always blows the fog horn. The two duties are not inconsistent or diverting, for the bell ringing and horn blowing are purely mechanical and do not interfere with a constant and ceaseless vigilance.

But assuming that Ohiser had dual duties, it certainly cannot be a culpable fault when both were discharged with 100 percent efficiency. Thus, in *The Nacoochee,* 137 U. S. 330; 341, the Supreme Court held (reversing a contrary judgment below) that where a sailor on a sailing vessel was acting as lookout and blowing the fog horn, and performed both duties properly, there was no fault.

This court has held that the lookout on a moving powered vessel must be free and single minded. (The *Koyei Maru,* 96 Fed. (2d) 652-654.) Assuming that a vessel at anchor must comply with the same standard, we submit that Ohiser as lookout fully complied with that standard, and the mechanical act of ringing the bell did not impair his efficiency.

The burden of proof was and is on the SAKITO to show that Ohiser was not a competent lookout and did not exercise the diligence the situation required. She must show, therefore, that he lacked attentive watchfulness.

The Catalina (C. C. A. 9), 95 Fed. (2d) 283; 285.

She failed to sustain that burden, and the evidence is overpowering that the OLYMPIC's lookout did everything that the most expert lookout at sea could have done.

E. "UNSEAWORTHINESS" OF OLYMPIC II.

The SAKITO claims that the OLYMPIC was guilty of certain statutory and rule violations with respect to certificated personnel and compliance with alleged "requirements" of the local inspectors, that she have an indefinite number of thwartship bulkheads. (Br. pp. 46-56.) By no stretch of the imagination did these factors, if existent, have anything to do with the collision, but if counsel can pin some statutory or rule violation upon the OLYMPIC they hope to get her under an impossible burden of proof under the rule of *The Pennsylvania,* 19 Wall. 125.

It is first claimed that the OLYMPIC was incompetently and inadequately manned because she was a "seagoing barge" and failed to have 65% of her deck crew able seamen, as required by the *La Follette Act,* as amended. (46 U. S. C. A. 672 b, c.)

This statute, by its terms, does not apply to unrigged vessels, except seagoing barges, and the trial court held that the OLYMPIC was not a seagoing barge within the meaning of the Acts of Congress. We shall discuss that holding a little later.

The cardinal condition precedent to any holding based upon a statutory violation is proof that the statute was violated. That burden was plainly upon the SAKITO and she did not sustain it.

First, there is no proof that the OLYMPIC's crew did not comply with the statute. Ohiser testified that he had only ordinary seaman's papers, but there was no proof that Culp and Greenwood did not so comply. Counsel say "no showing is made" that Culp and Greenwood had any certificates, and that is literally true. Neither is there any showing that they did not. Captain Andersen testified franky that he did not know and had not inquired whether or not they had papers or what they were. [A. I, p. 386.] But that is as far as the SAKITO went with the matter. The trial court made no finding that they did not have able seamen's certificates, and could hardly have done so in the state counsel chose to leave the record. A violation of the statute cannot be presumed and must be proved.

Second, assuming that at the time of the collision none of the three men on board was an able seaman, that does not constitute a violation of the statute. The statute provides that no vessel . . . shall be permitted *to depart from any port of the United States* . . . unless 65 percentum of her deck crew . . . are of a rating not less than able seamen. The only time the OLYMPIC ever departed from a United States port was when she left Los Angeles Harbor in May four months before the

collision. There is evidence that at that time she had a different personnel, and there is no showing that any or all of them were not able seamen. Again, violation of the law cannot be presumed. If there is any presumption, it is that the law was obeyed.

The trial court found on this issue that, without determining that the involved statute was applicable to the OLYMPIC, it was sufficient to say that "by no stretch of the imagination" did the lack of certificated personnel contribute to the collision or the resultant damage or loss of life. [A. I, p. 130.] There was a factual finding which cannot be disputed *on any phase* of the evidence.

The OLYMPIC's crew, certificated or not, did everything which could possibly be demanded by the most exacting tribunal, and counsel, with all their ingenuity, are unable to suggest a single respect in which this crew demonstrated incompetency. The evidence showed that proper sound signals were given, a competent lookout was kept, and when the OLYMPIC received her death blow these three men acted as coolly, efficiently and as heroically as could be expected of any crew afloat. Counsel do not and cannot point to a shred of evidence which is remotely contrary to the court's finding that the statutory violation (if it existed) could not have had contributive effect.

It is also claimed that the OLYMPIC, as a seagoing barge or as a vessel of over 100 tons carrying passengers, was subject to inspection by the Bureau of Marine Inspection and Navigation. (She had no current certificate of inspection at the time of collision because of reasons which will presently be set forth.) So, say counsel, she violated 46 *U. S. C. A.* 398, providing that if any seagoing barge be "navigated" without a certificate of inspection the owner

shall be liable for a penalty of $500.00. Counsel also refer to "requirements" of the local inspectors, relating to transverse bulkheads, and seek to leave the impression that in failing to comply with these requirements the OLYMPIC was guilty of violating a rule having the force of a statute.

As a background for further discussion, the court should have the picture of the factual situation as to inspection of these pleasure fishing barges:

Evidently the use of anchored vessels for this purpose is peculiar to the waters of the Southern California area. They began operations many years ago, and by 1940 there were from a dozen to twenty of them operating in coastal waters from Santa Barbara south. No one considered that they were subject to inspection and, indeed, the local inspectors would have nothing to do with them. In 1934, when the OLYMPIC was put into service, her owners applied for inspection and were told that none was required. About 1936, and about the time of the advent of the gambling ships, the Bureau decided that it had the power and duty to inspect pleasure barges. The OLYMPIC's owners promptly applied for inspection; she was inspected and received certicates of inspection for the years 1936, 1937 and 1938. The inspection for the latter year was just completed and the certificate issued when it was recalled by the inspectors, who, at that time, claimed that the barges had to comply with the load line act. The OLYMPIC duly surrendered her certificate. Later the Bureau decided that load line regulations did not apply and advised the OLYMPIC's owners that nothing would be done by way of inspecting the fishing barges until some contemplated new regulations were promulgated. There the matter rested until the summer of 1940, except that in

1939 the inspectors requested the OLYMPIC's owners to furnish a description and plans of the vessel, which were prepared and furnished and are in evidence as OLYMPIC's Exhibit 3.

In June of 1940 the local inspectors at Los Angeles addressed to the barge owners, including the OLYMPIC's owner, a letter stating that non-self-propelled vessels anchored on the seas were subject to inspection under the sea-going barge statute (46 U. S. C. A. 395), and that there was "submitted" an outline of the general requirements to be complied with. This outline was a mimeographed document of several pages, containing all sorts of structural and equipment specifications, set forth under forty-two heads. [A. I, pp. 390-401.] The OLYMPIC's owners addressed an appeal or protest to the director of the Bureau [A. II, pp. 789-792], which was denied. [*Id.* p. 744.] Thereabouts there were some conferences with Captain Fisher, the Supervisory Inspector, who informed the OLYMPIC's people that he was coming to Los Angeles shortly and they might be able to work out something. [A. I, p. 403.] We understand Captain Fisher was in San Pedro at the time of the collision, but had not gotten around to seeing Captain Andersen.

It is evident that, assuming the Bureau believed the new regulations were valid and within the power of the local inspectors to make, it did not, up to the time of the collision, consider that they were in effect nor had it made any attempt to enforce them. In a letter from Captain Fisher to the SAKITO's counsel, written during the trial and admitted in evidence [A. III, p. 1060], Captain Fisher said he "did not find any record" of a relaxation of the requirements of June 1940, and "had no recollection" of

granting a relaxation of these requirements. But this very negative statement was completely discredited by a letter from Commander Field, head of the Bureau of Marine Inspection and Navigation, to the Secretary of Commerce, which accompanied the report of the "A" Board which investigated the collision. This letter [A. III, pp. 785-7] concludes:

> "It was not deemed equitable, however, to require that the vessels immediately comply with the rigid requirements of inspection, and, therefore, the owners were given a reasonable length of time in which to comply with the requirements placed upon them. This was true in the case of the 'OLYMPIC II'." (p. 787).

As a matter of fact the purported regulations of June 1940 were *never* adopted by the Board of Supervising Inspectors or approved by the Secretary of Commerce, and the local inspectors never attempted to put them into effect. The fishing barges in Southern California waters continued to operate without inspection until after Pearl Harbor, when all activities outside the harbors were suspended by order of the military authorities.

Evidently both the inspectors and the barge owners were marking time and awaiting the outcome of a test case filed in the Southern District to ascertain if the fishing barges were subject to inspection at all. This suit was filed by the United States against the owners of the vessel KOHALA to recover the $500.00 penalty prescribed by 46 U. S. C. A. 398, requiring seagoing barges to have a certificate of inspection while being navigated. This case was pending at the time of the trial herein. In January 1942 Judge Beaumont decided the case and held that, assuming without deciding that the barges were

"seagoing barges" within the meaning of 46 U. S. C. A. 395, they were not "navigated" within the meaning of Section 398, while lying at anchor and serving their patrons as fishing platforms.

United States v. Monstad, 1942 A. M. C. 273.

As far as we can learn this decision has not been appealed.

The trial court in this case held that the OLYMPIC was not a "seagoing barge" within the meaning of Section 395. [A. I, pp. 133-6.]

The question of whether these barges or vessels are subject to inspection or not has always seemed to us an academic matter as far as this case is concerned, and we did our best to keep out of the controversy. It has always been our view and that of the OLYMPIC's owners that if the barges were not subject to inspection, they certainly ought to be. The OLYMPIC's owners did everything short of mandamus proceedings to get the inspectors to inspect and certify the vessel, and while they did protest against the regulations purportedly promulgated by the local inspectors in June 1940, it was only on the grounds that they were unreasonable, prohibitive and confiscatory. They did not at that time realize that the so-called regulations were utterly void and *ultra vires.*

It was our theory of the case that, as far as inspection itself was concerned, the matters of whether or not the OLYMPIC had been currently inspected, or at the time of the collision did or did not have a certificate on board, were absolutely immaterial, and the lack of inspection or certificate *per se* could not conceivably have affected the collision or its results. We were concerned only with

establishing that the OLYMPIC actually complied, as to bulkheads and other equipment, with the existing requirements of statute and the Rules of the Supervising Inspectors pertaining to any class of inspected vessels into which the OLYMPIC might fall. This proof was plain and undisputable, so time and again during the trial we declined to advocate the proposition that the OLYMPIC or her business did not come within the inspection laws. However, after submission of the case the trial court requested our assistance on the question of whether the OLYMPIC was subject to inspection as a seagoing barge or otherwise, and we presented the material we were able to find on those points.

We believed then, as we do now, that it is absolutely immaterial to this case whether the OLYMPIC should or should not have been inspected, but if the point is to be considered at all we owe it to the trial court to present the same material in defense of its holding. As this material is somewhat long, we are putting it in an appendix hereto, in the identical form it was submitted to the trial judge.

As far as the so-called requirements of the local inspectors are concerned, we hardly need argue that they were *ultra vires* and of no legal effect. In substance these regulations purported to create a new class of "seagoing barges" and to prescribe for them by general rule, without regard to the condition or structure of any particular vessel, revolutionary structure, equipment and manning requirements which had no possible authority or justification in law. No power exists to promulgate general rules and regulations governing the structure and equipment of a class of vessels or as to the standards of inspection but in Congress or the Board of Supervising Inspectors,

duly convened as a board or executive committee, and with the approval of the Secretary of Commerce. (46 U. S. C. A. 375.) Then and only then do the general rules partake of the force of law.

These alleged rules were promulgated by the local inspectors, without executive approval and without action by the Supervising Inspectors, either as a board or individually. Naturally the trial court held that the regulations of June 1940,—whether deemed in effect or not, were an absolute nullity. [A. I, p. 133.]

There can be no doubt that the OLYMPIC complied with every existing law or regulation pertaining to bulkheads and equipment in any class in which she conceivably might fall. No bulkheads whatsoever are required with respect to seagoing barges. One bulkhead is required for sailing vessels carrying passengers, which must be not less than 5 feet aft of the stem. (Rules of Supervising Inspectors, 1931, pp. 94-5; 129.) The OLYMPIC had such a bulkhead. The only requirements by statute or rule affecting seagoing barges are that they shall have approved equipment, consisting of one lifeboat, one anchor with suitable chain, and one life preserver for each person on board. (46 U. S. C. A. 396.) The OLYMPIC had all this equipment and much more. Her equipment fully complied with existing standards, for with it she had passed inspection time and time again.

So, subject to inspection or not, she actually complied with all statutory and rule requirements for a vessel of any possible class, and violated no statute or rule of safety possibly applicable to her.

As far as actual unseaworthiness is concerned, counsel's attempt to invoke *The Pennsylvania* rule is a confession

of inability to show from the evidence that unseaworthiness existed in fact, either as to manning or physical condition. The vague propaganda of unseaworthiness which permeates their presentation has no possible basis, except her age of 63 years. She had an iron hull and she was tight, staunch and strong. The talk about her "ancient plates" and "open and unprotected holds" is colorful, but does not mean anything. Her holds were not open or unprotected. She had a tight deck and tween-decks, and a tight hull; and she complied, as to bulkheads, with the present standards of Lloyds, American Bureau and the other great classification societies for any sailing vessel. Rule VI, Subd. 14, of the Supervising Inspectors (p. 179) provides that in the inspection of hulls, etc., the rules of the American Bureau of Shipping shall be accepted as standard by all inspectors, unless the rules otherwise provide. The rules of the American Bureau for 1940 (p. 31, Sec. 12) require for sailing vessels:— one collision bulkhead not less than 5 feet aft of the stem at the loadline.

The Olympic was not even put on her defense by any proof that her lack of additional bulkheads made her unseaworthy in fact, and *her* proof shows that she complied, as to bulkheads, with the class rules for sailing vessels carrying passengers.

Counsel for the Sakito seem to have the idea that the Olympic owed some duty to the Sakito to make herself sinking proof or damage proof. This is an astonishing concept of collision law and we have never encountered its like before. It seems to us the equivalent of a negligent automobile driver reproaching his victim because he was not riding in an armored truck. We confidently submit

that the OLYMPIC's only duty to SAKITO was to obey the applicable navigation laws, and if her condition permitted such compliance it does not matter an iota if her structure was seaworthy or unseaworthy. She might have been a water-logged wreck, but if she were properly anchored and gave proper signals, her condition could not have been a factor in the collision. Of course, the OLYMPIC's owners could not recover more than they lost, but they only recovered the *value* of the OLYMPIC as she was, and the amount of the recovery awarded is not challenged on this appeal.

The OLYMPIC, of course, owed her patrons and crew a duty to be seaworthy for the business in which she was engaged. She fully performed that duty, as the trial court found, and those of her patrons or their representatives who charged her with contributive unseaworthiness failed in their proof, and failed to obtain a recovery from the OLYMPIC's owners. They have all accepted the decision and have taken no appeals. Only the SAKITO, to whom no comparable duty was owed, complains of the decision.

It certainly does not lie with the SAKITO to invite the court to speculate as to whether the consequences of her great fault might have been less disastrous if the victim of that fault had been differently built or had been a larger or smaller or stronger vessel than she actually was. The SAKITO's faults were found to be the sole proximate cause of the collision [A. I, p. 137], which was the natural and obvious cause of all the consequences to the OLYMPIC and to those on board. No court would be justified in entering the realms of conjecture for the purpose of theorizing as to what might have resulted if

the OLYMPIC had been a different sort of ship than she was.

See:

The Walter A. Luckenbach (C. C. A. 9), 14 Fed. (2d) 100; 102-3.

For the sake of completing the presentation we shall examine briefly *The Pennsylvania* rule, or rather the burden of proof under it. If the OLYMPIC be held guilty of violation of any safety statute, either as to her manning or structure, it by no means follows that she has an unsustainable burden cast upon her. Severe as it is, *The Pennsylvania* burden is not a sort of "Tag! You are it!", but rests essentially upon principles of proximate cause. The burden is a practical one, and when there is a reasonable relation between the violation and the collision, a very heavy one. But where the statutory fault merely *exists* and has no operative effect in the collision picture, the burden, *ipso facto,* is sustained.

In *The Princess Sophia,* 61 Fed. (2d) 339; 347, this court said:

> "The penalty is not that the violator is to be accountable for any mishap, regardless of its relation to the violation."

This proposition was applied by this court to the assumption that the Princess Sophia had violated binding American statutes, both as to the sufficiency of the crew and of the ship's equipment, and it was held that the failures, if they existed, did not have causal connection with the disaster (p. 348).

The above quotation was repeated in *The Denali,* 112 Fed. (2d) 952; 957, and a number of other cases were

therein cited where the non-relation of the violation was recognized, expressly or in necessary effect.

The North Star (C. C. A. 2), 255 Fed. 955;

Southern Pacific Co. v. United States (C. C. A. 2), 72 Fed. (2d) 212;

The Suduffco (D. C. N. Y.), 33 Fed. (2d) 775.

In *The Denali* (*supra*) the statutory violation was plainly a presently operative factor in the stranding, whereas in the other cases the alleged violations could only be related to the disaster or its consequences by more or less specious conjecture or speculation, in which the courts declined to indulge, and findings by the trial courts or commissioners that the violations were non-contributive were affirmed. Characteristic of the latter cases is *The Iowa,* 34 Fed. Supp. 843, wherein Judge Fee made a careful study of *The Denali* case (pp. 848-50) and reached the conclusion that *The Denali* did not preclude application of the non-relation principle of *The Princess Sophia.*

In *The Iowa* (*supra*) and in the other cases just cited, counsel for claimants at least attempted to work out a relation between violation and disaster, but in the case at bar that is evidently beyond counsel's ingenuity. They evidently leave it to the court to do the speculating for them.

We submit that if, conceivably, the OLYMPIC could be found guilty of any statutory or rule violation as to her manning, structure or equipment, it had no more relation to the collision than an extinguished green light would have in the case of a vessel approaching and colliding on the port side. There is nothing but SAKITO's faults in the whole collision picture.

III.

The Doctrine of Remote Negligence and the Major-Minor Fault Rule.

Although the trial court found that the OLYMPIC was free of all contributive fault, it alternatively applied the so-called "last clear chance" rule of the common law, and held that regardless of possible antecedent fault of the OLYMPIC, the SAKITO, by the exercise of reasonable care, could and should have avoided the collision. [A. I, pp. 137-8.] Counsel say (Br. p. 69) that the court "mutilated the fundamentals" of the last clear chance doctrine, and that it is rudimentary that the last clear chance doctrine only applies when the respondent is aware of the libelant's situation of danger.

There are two schools of thought on the doctrine of last clear chance, the minority rule being as counsel state. The fundamental rule of the common law, if we recall correctly, rested on the old case of *Davies v. Mann,* wherein the plaintiff's donkey had been let to graze on the highway and a coach driven by the defendant (who did not see the donkey) ran into it. This is the majority common law rule and the one which, either under the label of "last clear chance" or "remote negligence" is applied in the admiralty. The test of the latter rule is whether the vessel to be charged *knew or ought to have known* of the position or situation of the other. This is the rule which was applied in *The Cornelius Vanderbilt* (C. C. A. 2), 120 Fed. (2d) 766, cited by the trial court. [A. I, p. 137.] This is the rule which this court applied in *Crowley Launch and Tugboat Co. v. Wilmington Transportation Co.,* 117 Fed. (2d) 651 (much to the writer's chagrin and to the glee of counsel

now representing the SAKITO). In that case it will be remembered that the CROWLEY was held solely in fault for failing to *see* the other vessel in its assumed improper position. The doctrine of remote or non-contributive negligence has also been applied by this court to exonerate vessels guilty of positive violations of safety statutes, local and national, where the unlawful acts were long antecedent to the collisions.

The Europe, 190 Fed. 475;

The Yucatan, 226 Fed. 437;

American Hawaiian S. S. Co. v. King Cole Co., 11 Fed. (2d) 41.

The first of the above cases involved improper lights, and the others unlawful positions.

While the trial court did not deem it necessary to consider the major-minor fault rule, it was elaborately briefed, and this seems to us to be a particularly cogent case for its application, should this court find anything to criticize in the OLYMPIC'S conduct or condition.

There is probably no situation in which the major-minor fault rule has been so often applied as where a moving vessel runs down one drifting or at anchor, and attempts to pass or divide the blame with the anchored vessel by casting or attempting to cast doubt upon the propriety of the latter's position or conduct.

The Oregon, 158 U. S. 186;

The Newburg (C. C. A. 2); 124 Fed. 954;

The Mishawaka (D. Me.), 10 Fed. Supp. 722.

The Suedco (D. Conn.), 283 Fed. 796.

It should be remembered that *The Pennsylvania* rule, relating to statutory faults, did not abrogate the major-minor fault rule. Indeed the leading case on the latter rule, *The City of New York,* 147 U. S. 85, was decided long after *The Pennsylvania,* and excused a statutory fault of the involved sailing vessel which undoubtedly had some contributing effect in the collision.

We have not attempted to exhaust the material on the two points discussed in this subdivision or do more than suggest that these principles may be a factor herein. We do not feel they are really involved in the case. We can see no fault, remote, minor or otherwise, which can fairly be attributed to the OLYMPIC.

Conclusion.

It is confidently submitted that no reversible error appears in the record, and that the decrees in the principal cause and in such other, if any, of the causes consolidated with it as this court holds to be properly before it, should be in all respects affirmed.

Respectfully submitted,

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Proctors for Appellees.

APPENDIX.

Extract from the OLYMPIC II's Reply Brief filed in the trial court upon submission of the Issues of Liability.

See foregoing brief on the merits, page 69.

Seaworthiness of the "OLYMPIC."

Until we received the court's request for all available data on the question of whether "OLYMPIC" was a seagoing barge within the meaning of Section 395 of Title 46 of the United States Code, we had not planned to discuss that question. It was and is our view that this case does not necessarily involve that question. Whether the "OLYMPIC" was subject to inspection or not, she actually complied, as to her structure and bulkheads, with all the requirements of statute and the rules of the supervising inspectors applicable to any class of vessels into which she could possibly fall;—unrigged vessel, seagoing barge, or even a sailing vessel carrying passengers for hire. However, as the court has requested counsel's assistance in respect to the seagoing barge question, we shall present the points we have been able to assemble in the first subhead herein.

A. WAS THE "OLYMPIC" A SEAGOING BARGE?

As a background to a discussion of the seagoing barge statute, it may be well to briefly consider the history of federal marine inspection.

The present statutes providing for inspection of vessels are a sort of uncompleted crazy-quilt of legislation, going back almost to the beginning of steam navigation. Originally only steam vessels were considered as proper

subjects for inspection and regulation, and with very few exceptions this archaic situation continued until the last decade. In 1898 the requirements of inspection were extended to sailing vessels of over 700 tons, carrying passengers for hire. Even at the present time, sailing vessels which do not carry passengers are exempt from inspection. In 1908 inspection was extended to cover seagoing barges. It was not until 1936, or thereabouts, that motor vessels were brought under inspection requirements.

No comprehensive statutory plan of marine inspection has ever been worked out, but Congress has tinkered and patched at the statutory structure from time to time, with a result highly unsatisfactory from an administrative as well as a judicial standpoint. The very efficient department of marine inspection and navigation has always been greatly handicapped for lack of a consistent and comprehensive statute covering all classes of vessels which, as a matter of expediency, should be subject to inspection and skilled regulation. These difficulties have been augmented because Congress has frequently provided detailed, specific requirements as to structure and equipment for certain classes of vessels, and has left the requirements in other cases largely, if not entirely, to the rule making power of the board of supervising inspectors. Thus, in the Lifeboat Act for steamers (Section 481), Congress has provided plans and specifications for lifeboats and rafts down to the last row-lock; whereas, in the seagoing barge statute, there are no congressional requirements or standards as to structure or equipment, except that every barge shall have one lifeboat, one anchor with a suitable chain or cable, and at least one life preserver for every person on board.

The sections dealing with seagoing barges,—Sections 395-8, were enacted as parts of the Shipping Act of May 28, 1908 and are Sections 10 to 13 thereof. The substance of the present Section 395 was originally presented in the Senate as a separate bill and was passed quite early in the session with perfunctory debate. A sponsor of the bill made the following statement on the floor:

> "Mr. Frye. I ask unanimous consent for the present consideration of the bill (S6487) to govern seagoing barges. There are 400 seagoing barges and they are the most dangerous of sea craft. Within two years 60 have gone to the bottom and 25% of the sailors have gone with them; the largest percentage of loss ever had on the ocean. They are absolutely without regulation. They are usually from 20 to 30 years of age. Many of them are old ships and barks which have been cut down after they were practically unserviceable, thus weakening their structural strength, and every once in a while one goes down in the ocean and takes with it its crew. Then again, it is easier for tugs to tow these barges with very long hawsers, making a range of barges three or four or five thousand feet long. Swayed hither and thither by the wind and tide and current, they constitute a worse danger to sailing ships and steamships than do derelicts. This bill simply provides that they shall be regulated, inspected and controlled as other seagoing vessels are . . .
>
> Mr. Kean: Does this regulate the length of tows?
>
> Mr. Frye: It does not. It simply allows the Secretary of Commerce and Labor to make rules and regulations in relation to it."
>
> Congressional Record 1908, p. 5333.

In the House, the Senate bill was incorporated with several other proposed enactments, some of which had already passed the Senate as independent bills. These dealt with the regulation of passenger steamers, mud scows in New York Harbor, and seagoing barges, and included the matter now embodied in Sections 395-8. There was considerable debate in the House on the bill as a whole, but that dealing with the seagoing barge aspect was practically a repetition of the statements made in the Senate. The following are pertinent passages from the debate:

> "Mr. Cox of Indiana. This bill gives to inspectors powers to inspect seagoing barges of 100 tons and over and the right to inspect each with a view of seeing whether or not they are seaworthy and are safe to operate on the high seas. The evidence disclosed that by reason of the failure to have (federal inspection) the loss of property heretofore has been considerable, as well as the loss of life . . .
>
> Mr. Sulzer: The bill is designed to regulate, so far as may be feasible at this time, the most dangerous form of navigation along our seaboard. There are between 400 and 500 seagoing barges of over 100 gross tons employed at present. During the past two fiscal years 60 of these barges were lost. Of the 60 vessels lost, 49 were built before 1898, and nearly half were over 30 years old. Many of these barges years ago were staunch ships and barks. As they have deteriorated they have been dismantled and large hatches have been cut in them, rendering them structurally even weaker. When for any cause these towed barges break loose from the towing steamer, those on board are practically helpless. Of 192 persons on board these 60 barges, 49 lost their lives, or over 25%, a death rate far in excess of the rate in

other classes of marine casualties here and abroad. A great demand in favor of this legislation comes from prominent people of New York, desirous to more carefully safeguard life on these seagoing barges."

Congressional Record 1908, pp. 6904-5.

The bill, as a whole, passed the House with little or no opposition, passed the Senate without a record vote, and was signed by the President.

It is quite evident from the debate that as far as conscious congressional intention was concerned, the subject of regulation was barges towed upon the high seas and engaged in carriage of property. The primary purpose was the safety of the lives of the crews, and a secondary one, the protection of navigation against the hazard of long tows. However, it is also apparent from the debate that the proponents of the bill did not contemplate that the regulation should be limited to conventional barges, but should include as well converted sailing vessel hulls which were towed on the high seas.

There is not much aid to be gained from the judicial interpretations of the statute, and so far as we can learn it has only been before the courts for general interpretation on two occasions. One was in our own circuit and one in the Supreme Court of Massachusetts. Both of these interpretations have involved questions of conflict of power as between state and federal authority over specific vessels.

The ninth Circuit case was *City of Los Angeles v. United Dredging Co.* (S. D. Cal.), 10 Fed. (2d) 239, affirmed (C. C. A. 9), 14 Fed. (2d) 364. The plaintiff

operated a dredge in Los Angeles Harbor under contract with the United States Government. It was equipped with engines and boilers for the purpose of operating the dredging shovels, and had living quarters for the man in charge and crew. It possessed no means of self-propulsion. The City of Los Angeles had an ordinance requiring a board of mechanical engineers to examine and license the operators of steam boilers and steam generating apparatus. The action was a suit to enjoin the city from causing the arrest of the plaintiff's employees, on the theory that exclusive power of regulation of a vessel of this type was vested in the federal authorities. Judge James granted the injunction, holding that the work of the steam dredge was maritime and that the structure was a seagoing barge within the meaning of Section 395. His judgment was affirmed on appeal. The Circuit Court of Appeals said that the evidence showed the vessels involved were great barges with dredging machinery put upon hulls having depth and staunchness to make it possible for them to be towed at sea; that they were decked over with hatches and carry crews of engineers and assistants during their operations, and were often towed long distances over the high seas. The principal concern of both courts was whether a dredge was such a vessel as to be a vessel or thing maritime within the admiralty jurisdiction, and the question of whether or not such a dredge was a seagoing barge received little attention. On this aspect of the case the appellate court said:

> "Our opinion is that section 10 (*supra*) (now section 395) is applicable to the barges involved in this suit. The fact that it has not been the practice of inspectors to inspect the barges is immaterial to the decision."

Evidently the case turned on the question of maritime subject matter. It is unlikely that the debates in Congress were brought to the attention of either court. It would seem to us that a very strong presentation could have been made to the effect that a vessel such as a harbor dredge, which performs practically all its functions within harbor waters, which is a flat-bottomed structure in the conventional form of a barge or scow, and which goes on the high seas only for the purpose of being transported from one scene of activity to another, was not a seagoing barge such as Congress intended to make subject to inspection laws. However, whether the point was seriously considered or not, the decision stands as a holding in this circuit that a harbor craft, which was built to be and was capable of being towed to sea, is a seagoing barge subject to inspection under Section 395.

In *Commonwealth v. Breakwater Co.*, 214 Mass. 10; 100 N. E. 1034, a prosecution was had under a local statute or ordinance relating to steam boilers. This particular boiler was part of the loading equipment of a rock barge, a large, flat-bottomed structure designed to carry cargo on deck and having accommodations for a crew. This barge in practice was towed back and forth on the high seas. The trial court, in effect, directed a verdict of guilty. The appellate court held that it was a question for the jury, under proper instructions, as to whether the particular barge was a seagoing barge within the intent of the act of Congress. If so, the verdict should be not guilty, for the barge was subject only to federal regulation. The court indicated its view that the test of a seagoing barge was one which might be expected with fair reason to ride out the ordinary perils of sea and which in fact does go

to sea. It suggested, however, that going to sea was not the true test of whether a barge was a seagoing barge within the congressional intent, as there might be vessels unsuitable for high seas work which in fact might go to sea successfully when conditions were favorable.

If this test is to be adopted, we would have very anomalous situation of a barge suitable for deep sea work being subject to inspection and one which was unsuitable being free to go to sea at will, freed of all inspection, regulation or control.

In 1938, in a series of acts amending the LaFollette Act of 1915, Congress excluded from the operation of the Act, as amended, seamen employed upon unrigged vessels "except seagoing barges," and included in the enactment the following definitions:

> "When used in Sections 645a, 660b and 672b:— (1) the term 'unrigged vessels' means any vessel that is not self-propelled; (2) the term 'seagoing barge' means any barge which, from its design and construction, may be reasonably expected to encounter and ride out the ordinary perils of the seas and which, in fact, in the usual course of its operations passes outside the line dividing inland waters from the high seas, as defined in Section 151 of Title 33, as amended."
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> 46 *U. S. C. A.* 672c.

Evidently the draftsman of these definitions was using the case of *Commonwealth v. Breakwater Co.* (*supra*) as his source, but curiously enough the definition is only made applicable to the term "seagoing barge" as used in the amendments to the LaFollette Act, and is not intended to apply to Section 395, which makes seagoing barges subject

to inspection. The LaFollette Act was purely a seamen's act, regulating the employment, duties and discharge of American merchant seamen.

When we apply this background of statute and judicial construction to the particular case of the OLYMPIC, it is fully apparent that there are some factors which suggest that she may come within the category of a seagoing barge, as intended by Section 395, and there are others which pointedly indicate that she does not.

Clearly it was not the Congressional intent to limit "seagoing barges" to vessels which were structurally flat-bottomed and square ended, and that there was intended to be included therein converted or cut down sailing ships or steamer hulls which did not proceed under their own power, but were towed at sea. It is equally clear that Congress did not intend to include in the category of seagoing barges all vessels, merely because they happen to be towed. Certainly it was not the intent that a full-rigged and manned sailing ship would be a sailing ship and subject to the laws governing sailing ships while proceeding under her own power, and become a seagoing barge because she happened to be towed by a tug on one or more voyages or parts of a voyage. It must be that some actual metamorphosis of structure has to take place before a vessel passes from one category to another. Just what that is seems to be entirely a matter of first impression.

Before dealing specifically with the case of the "OLYMPIC" it may not be amiss to go off the record and consider the history of another local vessel,—the "STAR OF SCOTLAND". She was an iron or steel sailing vessel, 50 feet longer than the "OLYMPIC". Like the "OLYMPIC" she had been one of the Alaska Packers fleet, and when that company gave up sail in favor of steam, she was sold to

operators of pleasure fishing craft. For some years she was anchored off Santa Monica and used just as the "Olympic" was used,—for the reception of fishermen who were brought out to her in shore boats. Whether she actually had sails on board we do not know, but all her top hamper and standing rigging were in place. She had her masts, top masts, top gallant masts, and possibly royal masts in place, with the usual yards, shrouds, stays and other standing rigging. To the eye and, we believe in fact, she was a conventional sailing vessel and needed only to bend on sails and move away under her own power. This invites the query,—Did she remain a sailing ship or had she become a seagoing barge merely because her then occupation was to lie at anchor and furnish a platform for fishermen?

A few years ago she was sold by her owners and emerged from the shipyards as the gambling ship "Rex". All her top hamper was taken down, including her lower masts. Her main deck was housed over with a large shed, and her main decks and tweendecks fitted up for gambling rooms, a restaurant, a bar, etc. To the eye, she ceased to look like a ship and indeed looked more like Noah's Ark than anything else. It was only on close approach and an observation of the clean hull lines that her former character could be comprehended.

After her brief and notorious function as a gambling ship she lay in the mud for some months, but is now being restored to her former state as a full-rigged sailing vessel, and will shortly be on the high seas again as such. The query which suggests itself is,—When, if ever, did the "Star of Scotland" cease to be a ship and become a barge? Curiously enough, during her service as a fishing vessel and when she had all her top hamper she was called,

in the general language of the port, a "fishing barge". When her top hamper was dismantled and she was converted to an ark, she become in common parlance a "gambling ship". Now she is to become a sailing vessel again.

We have no doubt that the "STAR OF SCOTLAND" ceased to be a sailing ship when her top hamper was dismantled and the superstructure was built on her decks. Did she become a barge or a seagoing barge? It is true that by reason of the essential structure of her hull she was capable of being towed at sea and was towed out to the scene of her activities and back again. It is, however, a very difficult stretch of the imagination to call her a barge, either by definition or as a matter of common parlance. About the only category in which she could fit as a gambling ship would be a "nondescript, non-self-propelled vessel", which inspired description will be found in one of the recent acts of Congress amending the limitation of liability law. (Title 46, Section 183b.)

On the other hand, we do not think she ceased to be a sailing ship while she retained all her top hamper, merely because she was used as a fishing platform. During all that time she was still essentially a ship,—not a barge or an unrigged vessel of any character. She was just as much of a ship as any sailing vessel which, on a voyage, might enter into a contract for towage for the purpose of expediting her passage.

Structurally the "OLYMPIC" was and always remained a ship. After her service with Alaska Packers the only essential change which was made in her was to take down her top hamper and store it in the tweendecks. Her lower masts were left at the caps. Her yards, spars and standing rigging were taken down and stored below decks. She could not, by merely bending on sails, depart from her

place of anchorage under her own power (except, of course, with a makeshift rig on her lower masts), but with a few days work by riggers, all her top hamper could have been replaced and she would have been just as much a sailing ship as she ever was.

Considerable thought on this question has led us to wonder if a good deal of confusion of thought on this problem is not due to the accident of local nomenclature. "Fishing barges" seem to be confined to this particular locality; —at least we have never heard of similar enterprises elsewhere. In the early days they were in fact barges—conventional flat-bottomed, square-ended boxes, such as those which haul rock back and forth from the Catalina quarries. To these box-like hulls were superadded flimsy deck structures to contain a little restaurant and other conveniences for the patrons.

Patrons got used to going to these vessels and calling them "fishing barges". Then ship hulls, wooden, iron and steel, began to be used. The economic impossibility of using sailing vessels made these hulls relatively cheap to acquire, and many of the operators adopted them as eminently more suitable than the flat-bottomed, square-ended hulls. However, the old name stuck and any vessel engaged in that occupation was a "fishing barge", whether she was a square box or a sailing vessel with all her rigging in place, like the "STAR OF SCOTLAND".

We submit, as a not unreasonable statement, that vessels such as the "OLYMPIC" and the "STAR OF SCOTLAND", and no doubt a number of others, really should be called "fishing ships". Certainly they did not become barges *per se* merely because of a change of occupation.

Owing to the radical changes in their structure, the gambling vessels were rendered more or less permanently

unsuitable as ships, yet, through the accident of nomenclature, no one ever called them anything but gambling ships.

The dictionary definitions of the term "barge" are not particularly helpful. In Webster's New International Dictionary we find the following:

> "barge; of uncertain origin. 1. A pleasure boat; a vessel or boat of state, elegantly furnished and decorated. 2. Any of various boats or vessels; as: (a) A roomy boat, usually flat-bottomed, and used principally in harbors and on rivers and canals, for the conveyance of passengers or goods; as, a coal barge. It may have sails or means of self-propulsion, but is more often towed. (b) *Nav.* A large, double-banked boat supplied only to a flagship for the use of the flag officer. (c) A double-decked vessel towed by a tug or steamboat;—used esp. for large pleasure parties. *U. S.* (d) A sailing vessel; a bark. *Obs.*"

In Bradford's Glossary of Sea Terms, the definition is:

> "Barge—a general name given to a large pulling boat. (Evidently the Admiral's barge of the navy or the 'barges' of royalty.) It is often given to flat-bottomed craft, but more particularly to vessels built for towage purposes."

We have not found any dictionary definition which includes within the term "barge", a cut-down or converted ship's hull, but there can be no doubt that on the east coast at least, sailing vessels and steamer hulls which are transported by being towed are called "barges", and in some cases "seagoing barges".

The practice of transporting cargo in cut-down or converted ships' hulls is quite prevalent on the east coast,

where the hauls between ports are short. These vessels generally carry small crews,—a barge master and two or three men to act as helmsmen, for these barges aid navigation to the extent of steering themselves at the end of the tow line. We had one or two on this coast during the last war, but as far as we know there have been none for many years. We do have a type of flat-bottomed barge in this area which fully meets the concept of seagoing barges, as indicated in the case of *Commonwealth v. Breakwater Co. (supra)*. These are the flat-bottomed barges operated by Wilmington Transportation Company, Rohl-Connolly Company, *et al*, and which are used in carrying rock from the Catalina quarries to the mainland. Some of these are very large vessels—over 100 feet long, but they do not steer, carry no crews, and have no accommodations for crews. These vessels, although seagoing, both as to structure and actual operation, are not inspected and do not carry lifeboats as required of seagoing barges by Section 396. To do so would be futile, for no persons are aboard them.

We submit that the question, whether any particular vessel is or is not a seagoing barge, is essentially a question of fact and not of law, and that as guide-posts for the determination of the fact a court might well apply the following considerations and questions:

While the matter of general or local nonmenclature should not be entirely disregarded, it should not be slavishly followed. A vessel is not a barge merely because it happens to be called a barge. The obvious intent of Congress was to make subject to inspection, unrigged vessels which transported goods or property on the high seas. Square-ended, flat-bottomed vessels, without sails or power, are barges by generic definition, and if designed

and intended to be used on the high seas, are seagoing barges *per se*. When the vessel under consideration was built and remains with the conventional lines and structure of a ship, she may fall into the category of a seagoing barge if she is actually dismantled so as to lose entirely her former character and is used or intended to be used in transportation on the high seas, with her motive power supplied by towing. The fact that a sailing vessel or steamer has her engines or rigging dismantled, in whole or in part, does not of itself destroy her character as a ship and make her a barge. The court must go further and ask if, on all the facts, her actual or intended use was such as to bring her reasonably within the Congressional intention, as disclosed by the language of the Act regulating seagoing barges, and explained by the debates in Congress.

Essentially the question is,—Has the vessel, in the light of all the circumstances, lost her character as a ship and become a barge? Before that question can be answered in the affirmative, the court must be satisfied that some essential change has taken place, for a ship will still remain a ship, rigged or dismantled, at sea or at anchor, as long as no change in her essential character has occurred.

In the limitation proceeding filed on behalf of "OLYMPIC", our friends who represented "SAKITO" claimed vigorously that "OLYMPIC" was not a barge, but a ship. We contended that she was a barge by ordinary nomenclature. It is perhaps fortunate for both sides that the duties of advocacy do not always require one to be consistent.

We may as well cover under this sub-head the question of whether the "Olympic", if not a seagoing barge, was subject to inspection under any other statute.

The only statute which has been suggested as an alternative possibility is the second sentence of Section 391, which provides:

> "The local inspectors shall, once in every year at least, carefully inspect the hull of each sail vessel of over 700 tons carrying passengers for hire and all other vessels and barges of over 100 tons burden carrying passengers for hire within their respective districts, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to be employed, has suitable accommodations for the crew, and is in the condition to warrant the belief that she may be used in navigation with safety to life."

Although she was structurally a sailing ship, it is hardly reasonable to say that the "Olympic" was a "sail vessel" at the time of this accident, as she did not propel herself by sail. But, whether she be regarded as a sail vessel or falling into the class of "other vessels and barges of over 100 tons burden", she was definitely not engaged in *carrying* passengers for hire.

This is no quibbling technicality. The "Olympic" did not "carry passengers". She furnished to her patrons a service, but it was not the service of carriage. She afforded them a floating platform, which did not move, upon which they were furnished certain facilities and comforts, and upon which they were permitted to fish.

The verb "carry" and its various parts, used transitively, has a definite connotation of transportation from place to place. It is defined in the standard dictionary as

"To bear or cause to be borne, as from one place to another". The definition in Webster's New International Dictionary is: "To convey or transport while supporting, originally in a cart or car, hence in any manner; to bear, to transfer, to take."

There can be no serious doubt that wherever the term "carrying passengers for hire" is used throughout the inspection statute, it refers to the conventional act of transporting passengers from place to place.

In *Chicago, R. I. & P. Ry. Co. v. Petroleum Refining Co.*, 39 Fed. (2d) 629-30, the question before the court was whether the movement of an empty tank car belonging to a shipper was a shipment or carriage. It quoted the standard dictionary definition of "carry" and said:

> "In the case of United States v. Sheldon, 2 Wheat. 119, 120, 4 L. Ed. 199, it was said: 'There is no doubt but that the word transport, correctly interpreted . . . means to carry, to convey.' Ogdensburg, etc. R. R. Co. v. Pratt, 22 Wall. 123, 133, 22 L. Ed. 827, said: 'Transported or carried are equivalent terms.'
>
> "The movement in the other way is expressed by the words 'pull', or 'draw', or 'push', or 'shove'."

A vessel or structure which does not move goods or passengers from place to place, but merely furnishes them with a platform or warehouse, upon or within which to rest, is not a carrier. This has been clearly established in the maritime law in cases with respect to goods. It is a common practice on the Great Lakes, where vessels are laid up during the winter, to use them as a combination carrier and warehouse for grain products. In some cases bills of lading have been issued calling for the transporta-

tion of wheat from one port to another, storage through the winter at the place of destination, and delivery in the spring. The courts have held consistently that those contracts have a definitely dual aspect. They are: (1) a contract for carriage; that is, transportation from the port of shipment to the port of destination; and (2) a contract for warehousing. These two involve absolutely different standards of liability and, indeed, that aspect of the contract which covers the furnishing of storage for the cargo is so essentially different from transportation that it is not cognizable in a court of admiralty. The cases are collected and discussed in *Pillsbury Flour Mills Co. v. Interlake S. S. Co.* (C. C. A. 2), 40 Fed. (2d) 439, where, under such a contract for shipment and storage, the vessel arrived with the cargo apparently in good condition, but during the winter something occurred to damage it. A suit in admiralty for cargo damage was dismissed for lack of jurisdiction, and the appellate court, in affirming the judgment, said, after reviewing the authorities:

> "These bills of lading embody a dual contract, one for transportation and the other for storage, and a breach of that contractual obligation which is non-maritime may not be the subject of a suit in admiralty. (Citing cases.) When the cargo arrived at Buffalo and came to anchor in the outer harbor, under the agreements contained in the bills of lading, the maritime service of carriage ended and the appellee then became a warehouseman for the grain. (Citing cases.) . . . The vessel encountered some heavy weather on her trip down but the grain, upon examination of insurance underwriters, was found not to have been damaged on arrival at the anchorage inside the breakwater. It was found, when the cargo

> was delivered April 7, 1928, that serious damage had been done to the grain. The libel pleads a breach of contract, not a negligent act. There was a constructive delivery and a termination of the maritime liability of the vessel on her arrival at her anchorage. At that time, the initial liability of the carrier changed to that of warehouseman." (pp. 440-1).

The contract or contracts which Hermosa made with its passengers or patrons also partake of a dual character. They embodied transportation by shore boats from shore out to the barge, and from the barge back to shore. That aspect of the engagement was truly a contract of carriage, and the shore boats were "carrying passengers for hire." The service on the barge was not the service of carriage or transportation or conveying. It was essentially the hiring and letting of space on a motionless platform;—about as close an analogy as we could get to the letting of the cargo space on a vessel for warehousing.

We should not be understood as saying that the hiring of such space to passengers for the purpose of fishing is not a maritime contract. We think it is. In that respect it differs from warehousing goods. Fishing is a maritime function, and the use of a vessel for fishing is a maritime service and a maritime transaction, but it is not the service of carriage, and vessels which afford such service cannot have their obligations measured by those standards applicable only to vessels *carrying* passengers for hire. The standards of seaworthiness as between a vessel and those who utilize her service are that the vessel shall be seaworthy for the purposes contemplated by the contract or transaction. If one contracts for *car-*

riage on a vessel as a passenger, he is entitled to have her comply with the standards of passenger *carrying* vessels. If he contracts for the use of a vessel as a platform, he is not entitled to expect the vessel to comply with the standards of a carrier. The same distinction applies as between one who offers goods to a vessel for *carriage* and one who offers them for *storage*.

In presenting the considerations under this sub-head, neither the writers nor Hermosa are to be understood as advocating that fishing barges or vessels rendering this sort of service should not be subject to inspection. We think they should and so does Hermosa. In its operations of the "OLYMPIC", Hermosa has always made every effort to have the vessel inspected. It has never looked for loop-holes in the law or sought to escape inspection by technicalities or otherwise. When the vessel was first about to commence operations in 1934, Captain Andersen applied for inspection, but was informed by the local inspectors that the office had no jurisdiction. In 1936 the local board suddenly reversed its attitude and assessed penalties against all the barges for not having certificates. Hermosa at once submitted the "OLYMPIC" for inspection, complied with all requirements provided by law and the general rules of the supervising inspectors, and received for 1937 and 1938 certificates of inspection. The return of the latter certificate was demanded in April 1938, within two or three weeks of its issuance, on the theory, apparently, that no outstanding certificates were valid unless the vessel complied with the

requirements of the coastline load line law. That attitude was shortly reversed, but when Captain Andersen sought the return of the certificate or a new inspection, he was informed that fishing barges would not be inspected pending some new requirements which were then in the course of formulation. Apparently about this time the local board was seeking information as to the structure of various of the so-called "pleasure barges", for it asked and received from Captain Andersen a blue print of the "OLYMPIC", which he furnished voluntarily and at no little expense. The history of Hermosa's relations with the Bureau of Navigation has been one of the fullest cooperation, and discloses the constant intent and desire to submit the vessel to inspection, whether she was required by law to be inspected or not. It would be a strange irony of fate if Hermosa should fortuitously suffer a penalty on account of the technicality of no certificate of inspection, in the face of its constant endeavor to comply with the law, regardless of technicality.

Whether these fishing barges or vessels are or are not seagoing barges, or are or are not within the statute requiring inspection of vessels carrying passengers for hire, we have little doubt that they should be subject to inspection and regulation, as all vessels should be upon which human lives are exposed to the perils of the sea. We are not even prepared to say that general rules comparable to the various "orders" or "minimum requirements" purportedly promulgated by the local board in June 1940 would not be desirable, not only with respect

to the so-called pleasure barges, but to all craft on the high seas or in harbors upon which human lives are exposed to the inevitable perils of maritime activity. But, subject to inspection or not, the "Olympic" on September 4, 1940 complied with all existing standards of seaworthiness, and liability may not be imposed upon her because from a social standpoint it might be desirable that these standards be made more rigid.

At the court's request we have covered, to the best of our ability, the question as to whether or not "Olympic" was subject to inspection as a seagoing barge or otherwise. We respectfully insist, however, that a solution of that problem is unnecessary to a decision in this case. Our reasoning has been fully set forth in our opening brief and will be augmented in the next sub-head, where we will take up what remains of the contentions advanced in the opening brief of the "Sakito".